Supreme Court, U.S.
FILED
95-725 NOV 6 - 1995
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO., and ALFA-LAVAL CREDIT AB,

Petitioners,

v.

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

MICHAEL DOCKTERMAN
(Counsel of Record)
CRAIG M. WHITE
THOMAS J. VERTICCHIO
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Suite 3000
Chicago, Illinois 60606-1229
(312) 201-2000
Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether, in a case governed by the Federal Arbitration Act, a court should enforce a contract providing that the American Arbitration Association shall conclusively decide whether to disqualify an arbitrator for an alleged failure to disclose circumstances that could affect the arbitrator's impartiality.

2. Whether when deciding a petition to vacate an arbitration award pursuant to the Federal Arbitration Act, a court should defer to an arbitrating body's prior decision not to disqualify an arbitrator for an alleged failure to disclose circumstances that could affect the arbitrator's impartiality, when the parties contractually agreed that the arbitrating body's decision on that issue would be "conclusive."

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
CITATIONS TO OPINIONS BELOW	1
GROUNDS FOR JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7

I.

DE NOVO REVIEW OF THE AAA'S CONCLUSIVE DECISION TO CONFIRM THE ARBITRATOR CONFLICTS WITH THIS COURT'S DIRECTIVE THAT THE FEDERAL ARBITRATION ACT BARS COURTS FROM INTERFERING WITH THE PARTIES' INTENTION TO ARBITRATE 10

A. Under the Act, Courts Must Enforce the Parties' Agreements Concerning the Substance and Manner of Arbitration 10

B. De Novo Review of Agreed Upon Arbitration Issues Contravenes the Federal Arbitration Act's Mandate That Arbitration Proceed in the Manner Provided in the Parties' Agreement 14

C. De Novo Review of an Arbitrational Body's Decisions Which the Parties Agree Are Conclusive Is an Egregious Example of the Jurisdictional Jealousy of Arbitration That the Act Was Enacted To Eradicate 18

II.

DE NOVO REVIEW OF AN ARBITRATING BODY'S CONCLUSIVE DECISION DISTURBS THOUSANDS OF CONTRACTUAL RELATIONSHIPS WHICH DEPEND ON RESOLVING DISPUTES THROUGH EFFICIENT AND CERTAIN ARBITRATION 22

CONCLUSION 26

APPENDIX

(Separate Volume)

	App. Page
Decision of the Court of Appeal of California	1
Order of the Supreme Court of California	29
Britz's Memorandum of Points and Authorities in Opposition to Petition to Compel Arbitration ..	30
Alfa-Laval's Reply to Memorandum in Opposition to Petition to Compel Arbitration	43
Letter from Rocco M. Scanza of the AAA to Messrs. White, Dockterman, Kaplan and Frame dated August 4, 1992 denying Britz's request to disqualify the arbitrator	56
Letter from Rocco M. Scanza of the AAA to Messrs. White, Dockterman, Kaplan, Frame, Vorzimer, Cotkin and Dolinsky dated February 18, 1993 reaffirming the arbitrator	58
Order of the Superior Court confirming arbitration award	60
Judgment of the Superior Court	63
Modification Order of Court of Appeal of California	65

TABLE OF AUTHORITIES

Cases	PAGE
Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248 (9th Cir. 1973)	6, 16, 18
Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834 (1995)	12, 18, 19
Bernard v. Hemisphere Hotel Management, Inc., 450 N.E.2d 1084 (Mass. App. Ct.), *review denied*, 454 N.E.2d 1276 (Mass. 1983)	13
Britz, Inc. v. Alfa-Laval Food & Dairy Co., 34 Cal. App. 4th 1085, 40 Cal. Rptr. 2d 700 (Cal. Ct. App. 1995)	6, 7, 18, 21
Cellular Radio Corp. v. OKI America, Inc., 664 A.2d 357 (D.C. 1995)	13
Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968), *reh'g denied*, 393 U.S. 1112 (1969)	17
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)	8, 14
First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995)	12, 15
Freeport Constr. Co. v. Star Force, Inc., 378 N.E.2d 558 (Ill. App. Ct. 1978)	14
George Constr. Co. v. United Brotherhood of Carpenters & Joiners of Am., 722 F.2d 1471 (9th Cir. 1984)	15
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)	20
J. Alexander Sec., Inc. v. Mendez, 114 S. Ct. 2182 (1994)	25

Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) 12

Mertit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983) .. 24

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 11, 20

Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992) 17, 20, 23

Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1 (1983) 11

Prima Print Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 12

Remmey v. PaineWebber, Inc., 32 F.3d 143 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995) 21, 24, 25

Sanford Home for Adults v. Local 6, IFHP, 665 F. Supp. 312 (S.D.N.Y. 1987) 24

Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994) .. 17

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) *reh'g denied*, 483 U.S. 1056 (1987) 11

Southland Corp. v. Keating, 465 U.S. 1 (1984) ... 11, 25

United States v. Ruzicka, 329 U.S. 287 (1946) ... 22

Van Syoc v. Walter, 613 A.2d 490 (N.J. Super. Ct. App. Div. 1992), *cert. denied*, 627 A.2d 1136 (N.J. 1993) 13

Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468 (1989) 8, 10, 11

York Hannover Holding A.G. v. American Arbitration Ass'n, No. 92 Civ. 1643 (CSH), 1993 WL 159961, (S.D.N.Y. May 11, 1993) 13

Statutes

9 U.S.C. § 2 ..... 2, 8, 14

9 U.S.C. § 4 ..... 2, 4, 8, 11, 14

9 U.S.C. § 10 ..... 12, 17, 18

28 U.S.C. § 1257(a) 2

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) 8, 10, 11, 19, 23

S. Rep. No. 536, 68th Cong., 1st Sess. (1924) 8, 19

S. Ct. R. 10(c) 2

S. Ct. R. 29.6 1

Miscellaneous

American Arbitration Association, *1994 Statistical Report* (1995) 23

David Margolick, *Chief Justice Proposes Arbitration To Stem "Avalanche" of Lawsuits*, N.Y. Times, Jan. 25, 1982, at A19 19

Ladd, "Introduction" to *I. Kant, The Metaphysical Elements of Justice*, xxii (J. Ladd trans. 1965) . 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO., and ALFA-LAVAL CREDIT AB,

Petitioners,

v.

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

Petitioners Alfa-Laval Food and Dairy Company and Alfa-Laval Credit AB (collectively "Alfa-Laval" or "Petitioners") respectfully pray the Court issue a writ of certiorari to review the judgment and order of the Supreme Court of the State of California entered on August 10, 1995, denying review of the judgment and opinion of the Court of Appeal of California, Fifth Appellate District entered on May 8, 1995 and modified on June 6, 1995.[1] The order denying review by the Supreme Court of the State of California is not reported, but is reprinted in full in the appendix hereto at App. 29. The decision of the Court of Appeal of California, Fifth Appellate District is reported at 34 Cal. App. 4th 1084, 40 Cal. Rptr. 2d 700 (Cal. Ct. App. 1995), and is reprinted in full in the appendix hereto at App. 1-App. 28.

GROUNDS FOR JURISDICTION

On August 10, 1995, the Supreme Court of the State of California issued an order denying review of the judgment and opinion of the Court of Appeal of California. The court of appeal had reversed the California Superior Court's order confirming an arbitrator's award in favor of Alfa-Laval and denying Britz, Inc., Helm Concentrates, Inc. and Helm Tomatoes, Inc.'s motion to vacate the award on the basis of the arbitrator's alleged failure to disclose circumstances bearing on the appearance of his impartial-

---

[1] Tetra Laval U.S. Holdings, Inc. a Delaware corporation, is the parent company of Petitioners Alfa-Laval Food and Dairy Company and Alfa-Laval Credit AB; there are no subsidiaries of Petitioners which are not wholly owned. This information is provided pursuant to Supreme Court Rule 29.6.

ity. Both the superior court and court of appeal concluded their decisions were "governed by the Federal Arbitration Act." App. 6.

This Court has jurisdiction to review the decision below in that it concerns Petitioners' "[r]ight[s] . . . claimed under the . . . statutes of . . . the United States." 28 U.S.C. § 1257(a). In violation of Sections 2 and 4 of the Federal Arbitration Act, the decision below eviscerates an arbitration clause in a contract involving interstate commerce. 9 U.S.C. §§ 2, 4. The California court "has decided an important question of federal law which has not been, but should be, settled by this Court," and "has decided a federal question in a way that conflicts with applicable decisions of this Court." S. Ct. R. 10(c).

STATUTES INVOLVED

Section 2 of the Federal Arbitration Act (the "Act"), concerning validity, irrevocability, and enforcement of agreements to arbitrate, states:

> A written provision in any maritime transaction or ***a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction***, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.***

9 U.S.C. § 2 (emphasis added).

Section 4 of the Act establishes a rule of allowing parties to agree upon the manner in which they arbitrate, and states in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that ***such arbitration proceed in a manner provided for in such agreement.***

9 U.S.C. § 4 (emphasis added).

STATEMENT OF THE CASE

In 1989, Respondents, Britz, Inc., Helm Concentrates, Inc., and Helm Tomatoes, Inc. (collectively "Britz" or "Respondents") contracted with Alfa-Laval to buy and lease certain machines and equipment necessary for their operation of a tomato paste processing plant in Helm, California. The parties' sale and lease contracts contain a mandatory arbitration provision, which states:

> Any controversy or claim arising out of or relating to these General Conditions of Plant Sales and other documents comprising the agreement between Seller and Purchaser, or the breach thereof, shall be settled by arbitration in accordance with the commercial arbitration rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

In 1990, disputes arose between the parties concerning the capabilities of the equipment Alfa-Laval provided to Britz under the parties' various contracts. Britz filed suit in California and Alfa-Laval moved to compel arbitration. On November 29, 1990, the California Superior Court of Fresno County, as authorized by the Federal Arbitration Act, ordered the parties to arbitrate their disputes through

the American Arbitration Association (the "AAA") pursuant to the mandatory arbitration clauses in the contracts.[2] The parties agreed to the appointment of a single arbitrator, John E. Peterson, a Fresno attorney. In the arbitration, Britz sought damages in excess of $40,000,000, and Alfa-Laval counterclaimed for more than $1,000,000 in damages.

The parties agreed to bifurcate the arbitration. The liability phase began on January 6, 1992, and testimony lasted for three weeks. On May 22, 1992, the arbitrator issued an interim liability award in favor of Alfa-Laval. Thirty-three days later, Britz asked the arbitrator to disclose any financial or personal interest he had with the law firm that acted as Alfa-Laval's local counsel in the superior court proceedings to compel arbitration, McCormick, Barstow, Sheppard, Wayte & Carruth. The McCormick firm was only peripherally involved in the legal dispute and did not participate in the arbitration. In response to Britz's inquiries, Mr. Peterson disclosed certain referral relationships with the McCormick firm and some expert witness services for McCormick clients. On July 21, 1992 Britz filed an objection to Mr. Peterson's continued service as arbitrator with the AAA pursuant to the parties'

---

[2] Application of the Federal Arbitration Act was determined in the first instance by the superior court in November of 1990 when Britz opposed Alfa-Laval's motion to compel arbitration. App. 35 ("The Federal Arbitration Act . . . is applicable to defendant's petition to compel arbitration. . . . All of the transactions involved in the case at bar involved interstate commerce."); *see also* Alfa-Laval reply at App. 52 ("The plaintiffs are correct in stating that the Federal Arbitration Act is applicable to the written provisions in a contract evidencing interstate commerce. They are also correct in stating that this dispute involves interstate commerce."). On appeal, the court below noted "this case is governed by the Federal Arbitration Act." App. 6.

agreed-upon procedures under Rule 19 of the Commercial Arbitration Rules of the American Arbitration Association (AAA Rule 19). Rule 19 provides:

> Any person appointed as neutral arbitrator shall disclose to the AAA any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. ***Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.***

AAA Rule 19 (emphasis added).

On August 4, 1992, after "careful review" of the issue and of the briefs submitted by both sides and "in accordance with Section 19 of the Commercial Arbitration Rules," the AAA denied "the challenge submitted by [Britz] to the Arbitrator's continued service" and reaffirmed his "appointment and continued service on the above-captioned matter." App. 56. On February 4, 1993, prior to the commencement of the damages phase of the arbitration hearings, Britz petitioned the AAA for "reconsideration" of the AAA's August 4, 1992 decision denying Britz's objection to the arbitrator's continued service. On February 18, 1993, the AAA denied Britz's request for reconsideration and again confirmed Mr. Peterson's service as the arbitrator. App. 58.

The evidentiary hearing on damages proceeded, and on March 31, 1993, the arbitrator issued a final award of $587,425 plus costs and attorneys' fees in favor of Alfa-Laval. On May 6, 1993, the arbitrator issued a supplemen-

tal award of $1,412,953.75 for Alfa-Laval's attorneys' fees and $696,747.45 for its costs. Britz petitioned the California Superior Court of Fresno County to vacate the arbitrator's award and argued that the AAA had erred by not disqualifying Mr. Peterson. Alfa-Laval moved to dismiss Britz's petition to vacate and filed a petition to confirm the arbitration award. After a hearing, the superior court "determined AAA's resolution of the conflict issue was a 'plausible interpretation of the law and facts and was rendered with a minimum standard of fair dealing.' " *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 1101, 40 Cal. Rptr. 2d 700, 708 (Cal. Ct. App. 1995). The superior court denied Britz's petition to vacate and confirmed the arbitrator's award in Alfa-Laval's favor. App. 61-62.

The Court of Appeal of California, Fifth Appellate District, reversed and remanded to the trial court for a new hearing. *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 40 Cal. Rptr. 2d 700 (Cal. Ct. App. 1995). The court first noted that the Federal Arbitration Act governs the case. *Id.* at 1094, 40 Cal. Rptr. 2d at 704-05. The court next acknowledged that courts normally review an arbitrator's factual determinations with deference: "[w]hen the parties to a contract agree that a factual determination is to be made by a neutral third party that determination is upheld in the absence of fraud or gross mistake as would necessarily imply bad faith." *Id.* at 1102, 40 Cal. Rptr. 2d at 710 (citing *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 252 n.5 (9th Cir. 1973)). But the court failed to recognize that the parties were contractually bound to follow AAA Rule 19 and that the AAA's decision not to disqualify the arbitrator was "conclusive." Instead, the court below held "that a trial court considering a petition to confirm or vacate an arbitration award is required to determine, de

novo, whether the circumstances disclose a reasonable impression of arbitrator bias, when that issue is properly raised by a party to the arbitration." *Id.* at 1103, 40 Cal. Rptr. 2d at 710. The court reasoned that it could not trust the AAA with such a determination because of the AAA's "vested interest" in the decision. *Id.* at 1102-03, 40 Cal. Rptr. 2d at 710.

Alfa-Laval petitioned the Supreme Court of California for review. On August 10, 1995, the Supreme Court of California denied review. App. 29. Petitioners now request that this Court grant a writ of certiorari to determine whether, in a case governed by the Federal Arbitration Act, a trial court should defer to an arbitrating body's decision not to disqualify an arbitrator for an alleged failure to disclose circumstances that could affect the arbitrator's impartiality, when the parties contractually agreed that the arbitrating body's decision on that issue "shall be conclusive."

REASONS FOR GRANTING THE WRIT

This is the first case to involve a considered determination by an appellate court on how to review a decision involving alleged arbitrator bias when that decision was committed by contract to the arbitrating body. The court below, attempting to interpret the Federal Arbitration Act, held that courts must review such decisions by an arbitrating body—in this case the American Arbitration Association—de novo whenever an issue of bias has been raised. The case law upon which the court relied, however, dealt with disputes where the parties had not previously agreed to submit such questions to the arbitrating body. In this case, the parties contractually agreed to, and did in fact, take the arbitrator bias issue to the arbitrating body for a conclusive decision.

The decision below raises significant issues relating generally to the enforcement of arbitration agreements pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1-14) and specifically to this Court's mandate that courts "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989) (citation omitted). Despite this clear directive, the Court of Appeal of California refused to enforce the parties' agreement that the AAA's decision whether to disqualify the arbitrator would be "conclusive." Instead, the court set a standard of de novo review by a trial court of each allegation of arbitrator bias. This ruling violates the statutory mandate that arbitration contracts "shall be valid, irrevocable, and enforceable" and that courts shall enforce arbitration contracts so the "arbitration proceed[s] in a manner provided for in such agreement." 9 U.S.C. §§ 2, 4. The decision by the court of appeal to recapture for the courts all issues which bear upon alleged arbitrator bias is an egregious example of the judiciary's jurisdictional jealousy of arbitration, which the Act was enacted to redress (*see* H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 2-3 (1924)), and for which this Court has repeatedly admonished lower courts. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

The decision below conflicts with this Court's directive to enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478, and is based upon a misinterpretation of the Federal Arbitration Act. Once the talismanic invocation of bias was made, the court below felt constrained by the Act to conduct a de novo review, effectively to blunt the allegations of bias with a judicial look at a claim which the American Arbitration Association has

twice decided. The mandated judicial review is to be undertaken as if the AAA did not exist, and as if the parties' agreement to AAA Rule 19 has no meaning. As an extension of the law by a respected appellate court, this adoption of de novo judicial review for each allegation of arbitrator bias establishes a hole in the Act to which every dissatisfied litigant may turn when an arbitration goes badly.

The decision below undermines the effective administration of the Act and casts doubt upon the thousands of relationships among businesses and individuals who have incorporated AAA Rules into their arbitration agreements on the premise that arbitration will keep them out of court. AAA Rule 19 provides that the AAA "shall" hear all objections to an arbitrator's continued service based on alleged nondisclosures or evident partiality and shall make a "conclusive" decision whether to disqualify the arbitrator. AAA Rule 19. Thousands of parties depend on the arbitrating body's conclusive resolution of nondisclosure and disqualification issues. These parties execute contracts committing this very decision to the body specified in their agreements. De novo review by trial courts of agreed arbitration issues eviscerates the purpose of the Act—to avoid relitigation of arbitrated issues—and denies the parties the benefit of their bargains.

I.

DE NOVO REVIEW OF THE AAA'S CONCLUSIVE DECISION TO CONFIRM THE ARBITRATOR CONFLICTS WITH THIS COURT'S DIRECTIVE THAT THE FEDERAL ARBITRATION ACT BARS COURTS FROM INTERFERING WITH THE PARTIES' INTENTION TO ARBITRATE.

A. Under the Act, Courts Must Enforce the Parties' Agreements Concerning the Substance and Manner of Arbitration.

The Federal Arbitration Act was enacted principally to ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). Prior to the Act, courts often had refused to enforce valid arbitration agreements due to the judiciary's traditional aggression toward arbitration and its jurisdictional jealousy of arbitrators' authority. The House of Representatives Report reflects this concern:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

To overcome this jurisdictional jealousy, Congress crafted the Federal Arbitration Act, which precludes courts from interfering with the manner in which parties agree to arbitrate. Section 2 of the Act embodies a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to

the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983). Similarly, Section 4 evinces a legislative intent that "arbitration [should] proceed in [the] manner provided for in [the parties'] agreement." 9 U.S.C. § 4. Indeed, the Act's legislative history manifests this respect for the parties' contract to arbitrate. The House of Representatives Report states:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).

This legislative intent to enforce arbitration agreements like all other contracts applies to all aspects of the contract. The parties' agreement determines the substance of and the procedures for the arbitration. This Court's precedent establishes that the judiciary may not interfere with the parties' intent to arbitrate, to submit certain issues to arbitration, or to conduct the arbitration in a designated manner. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Just as [parties] may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted.") (citation omitted); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under the Securities Exchange Act and RICO are arbitrable) *reh'g denied*, 483 U.S. 1056 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (Act preempts state laws voiding arbitration clauses and applies in state

courts); *Prima Print Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraud in inducement of entire contract arbitrable under broad arbitration clause).

In 1995, the Court issued three opinions holding that lower courts misconstrue the Act when invoking state laws or other concerns to override the parties' contractual terms. *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995) ("[I]f contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995) (upholding enforceability of arbitration agreement governed by Alabama law, even though an Alabama statute provides that arbitration agreements are unenforceable). In *First Options*, the Court held that an arbitrator may decide the arbitrability of substantive issues if the parties agree that the arbitrator, rather than the court, will do so. "[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." *First Options*, 115 S. Ct. at 1923. The Court reached this decision even though courts normally have authority under the Act to determine de novo whether the arbitrator exceeded his or her power. 9 U.S.C. § 10(b).

In the present case, the parties specifically adopted the AAA rules as part of their contract.[3] Britz and Alfa-Laval

[3] AAA Rule 1 states:

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided

(Footnote continued on following page)

contractually agreed that either of them could object to the arbitrator's continued service if it believed the arbitrator failed to disclose circumstances likely to affect his impartiality. They also contractually agreed that upon such an objection, the AAA's decision concerning whether to disqualify the arbitrator "shall be conclusive." AAA Rule 19.[4] Thus, in the same way the *First Options* parties

---

[3] *continued*

> for arbitration by the American Arbitration Association (hereinafter AAA) or under its Commercial Arbitration Rules. These rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration or submission agreement is received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules.

AAA Commercial Arbitration Rule 1; *see also Cellular Radio Corp. v. OKI America, Inc.*, 664 A.2d 357, 358 n.3 (D.C. 1995) ("The rules were expressly incorporated by the parties' contract. [Rule 1.] Hence, Cellular was bound to adhere to them."). In addition, AAA Rule 3 states:

> When parties agree to arbitrate under these rule, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct.

AAA Commercial Arbitration Rule 3.

[4] Several courts have specifically recognized a party's right to have the AAA conclusively decide whether to disqualify an arbitrator due to nondisclosure. *York Hannover Holding A.G. v. American Arbitration Ass'n*, No. 92 Civ. 1643 (CSH), 1993 WL 159961, *5 (S.D.N.Y. May 11, 1993) (deference to AAA's conclusive decision under Rule 19 that arbitrator was not biased); *Bernard v. Hemisphere Hotel Management, Inc.*, 450 N.E.2d 1084 (Mass. App. Ct.) (trial court erred in interfering with AAA's decision to remove arbitrator and to allow arbitration to continue), *review denied*, 454 N.E.2d 1276 (Mass. 1983); *Van Syoc v. Walter*, 613 A.2d 490 (N.J. Super. Ct. App. Div. 1992) (affirming deferential review of AAA decision not to disqualify arbitrator), *cert. denied*, 627 A.2d 1136

(Footnote continued on following page)

agreed to submit the issue of arbitrability to arbitration, Britz and Alfa-Laval contractually agreed that disqualification based on nondisclosure would be an arbitrable issue for the AAA's conclusive resolution. Under the Act, a lower court must enforce this contractual term and defer to the AAA's decision on disqualification. To hold otherwise conflicts with this Court's holdings, and disembowels the Federal Arbitration Act.

B. De Novo Review of Agreed Upon Arbitration Issues Contravenes the Federal Arbitration Act's Mandate That Arbitration Proceed in the Manner Provided in the Parties' Agreement.

Under the Act, courts may not interfere with arbitration by refusing to enforce the parties' agreement. Similarly, courts may not nullify the parties' agreement with a de novo review of the arbitrating body's orders, doing through a back door what the Act expressly prohibits them from doing through the front. By invoking a de novo standard of review in cases such as this, courts annul the parties' binding agreement to arbitrate and, necessarily, violate the requirement of Sections 2 and 4 of the Act that courts "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The lower court's mandated de novo review of the AAA's "conclusive" decision overruling a party's objection to the arbitrator is simply a refusal to enforce the parties' agreement to arbitrate according to the AAA Commercial Arbitration Rules.

---

[4] *continued*

(N.J. 1993); *cf. Freeport Constr. Co. v. Star Force, Inc.*, 378 N.E.2d 558, 560 (Ill. App. Ct. 1978) (specifically distinguishing situation where AAA rules did not provide that its determination would be binding).

Addressing what standard of review a trial court should apply to an arbitrator's decision concerning arbitrability, the *First Options* Court began with the general rule that the parties' agreement defines the standard for measuring the degree of judicial intervention into the arbitration process. *First Options*, 115 S. Ct. at 1923. The Court explained:

> If the parties agreed to submit the question itself to arbitration, the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.

First Options, 115 S. Ct. at 1923 (citations omitted).[5] If the parties did not agree to submit a matter to the entity administrating the arbitration, then the court should decide the matter "just as it would decide any other question that the parties do not submit to arbitration, namely independently." *Id.* at 1924. These two standards flow inexorably from a court's obligation under the Act "to insure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties." *Id.* at 1925 (internal quotes and citations omitted).

Courts generally use a deferential standard to review decisions by the AAA when the parties agree that the

---

[5] *See also George Constr. Co. v. United Brotherhood of Carpenters & Joiners of Am.*, 722 F.2d 1471, 1477 (9th Cir. 1984) ("Moreover, this deferential standard of review applies when the parties have submitted legal questions to the arbitrator 'even if the question is one that is ordinarily for the courts to decide.' ") (citation omitted).

decision will be final or conclusive. In *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973), the court ruled that the district court improperly interfered with the AAA's independent decision concerning arbitration venue. The parties' contract provided that any dispute was subject to arbitration in accordance with AAA rules. Pursuant to its rules, the AAA decided that the parties should arbitrate in New York, which decision was affirmed by the Association's Executive Vice President. *Id.* at 249-50. AAA Rule 10 states that such a decision "shall be final and binding." The objecting party filed suit in the district court, which enjoined the arbitration from proceeding in New York pending a trial on the merits. Noting that the " 'correctness' of the arbitrator's ruling is not a proper concern of the reviewing court," the court of appeals reversed the district court. *Id.* at 252. The court found there was no reason for the district court to review independently the AAA's venue decision or to vacate the AAA's decision: there was no partiality by the AAA; the AAA did not exceed its contractual authority; and the decision was not rendered in "manifest disregard of the law." *Id.* The court concluded: "[w]hen the parties to a contract agree that a factual determination is to be made by a neutral third party that determination is upheld in the absence of fraud or gross mistake as would necessarily imply bad faith [by the arbitrating body]." *Id.* at 252 n.5.

In this case, a de novo review of the AAA's "conclusive" decision to confirm the arbitrator similarly interferes with the parties' agreement to arbitrate. By failing to enforce the parties' arbitration contract with regard to the conclusive procedures employed in ruling on an objection to the arbitrator, the court below denies the parties the benefit of their bargain—finality on the issue of disqualification.

> Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive because the parties have agreed that it be so. By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain.

Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 10, 832 P.2d 899, 903, 10 Cal. Rptr. 2d 183, 187 (1992).

Section 10 of the Act does not require de novo review in cases such as this. *See* 9 U.S.C. § 10. An independent judicial evaluation is neither warranted nor appropriate when the parties agree that matters concerning the extent of an arbitrator's obligation to disclose circumstances likely to effect impartiality, and whether an arbitrator should be disqualified, are to be decided conclusively by an arbitrating body, in this case the AAA.[6]

Britz and Alfa-Laval contractually agreed that any decision rendered by the AAA concerning the arbitrator's disclosure duties shall be conclusive. AAA Rule 19. Like the *First Options* parties who contracted to preclude a court from making a de novo review under Section 10(4) of the Act concerning whether arbitrators exceeded their

---

[6] This case is distinguished from those in which a party alleges nondisclosure, evident partiality, or bias, but did not contractually submit the issue to an extra-judicial tribunal for conclusive resolution. *See Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), *reh'g denied*, 393 U.S. 1112 (1969); *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) (arbitration under the National Association of Securities Dealers which does not have provision for conclusive decision by tribunal on issues of bias and disqualification).

powers when determining arbitrability, the parties here contractually precluded de novo review under Section 10(2) concerning whether the arbitrator was evidently partial. They agreed that the AAA, rather than the court, would decide that issue conclusively. The court must defer to the AAA's decision unless the AAA itself was biased.[7] Any other rule of law injects a new layer of litigation into a process where the parties obviously intended to eliminate litigation, confounding the object of arbitration and effectively denying the parties the benefit of their bargain.

C. De Novo Review of an Arbitrating Body's Decisions Which the Parties Agree Are Conclusive Is an Egregious Example of the Jurisdictional Jealousy of Arbitration That the Act Was Enacted To Eradicate.

Congress enacted the Federal Arbitration Act to combat the kind of aggression toward arbitration evidenced by the court of appeal's refusal to enforce the parties' agreement to allow the AAA to decide conclusively the issue of disqualification. *See Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 252 n.5 (9th Cir. 1973). The Act helps parties to overcome courts' refusals to enforce agreements to arbitrate. *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 838 (1995) (citation omitted). The *Allied-Bruce* Court commented:

---

[7] There has been no allegation that the AAA, the body that addressed the arbitrator's nondisclosure and decided not to disqualify him, was evidently partial or outright biased, or that the AAA committed any wrong at all. The appellate court even noted: "This is a non-disclosure case. It is not a case in which actual bias is alleged." *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 1103, 40 Cal. Rptr. 2d 700, 711 (Cal. Ct. App. 1995).

> The origins of these refusals apparently lie in "ancient times," when the English courts fought "for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction." *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring). . . . American courts initially followed English practice, perhaps just "standing . . . upon the antiquity of the rule" prohibiting arbitration clause enforcement, rather than "upon its excellence or reason." *Bernhardt v. Polygraphic Co., supra*, 350 U.S. at 211 n.5. . . . Regardless, when Congress passed the Arbitration Act in 1925, it was "motivated, first and foremost, by a . . . desire" to change this arbitration rule. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985). It intended courts to "enforce [arbitration] agreements into which parties had entered," *ibid.* (footnote omitted), and "to place such agreements under the same footing as other contracts," *Volt Information Sciences, Inc., supra*, 489 U.S. at 474.

Id. at 838 (some internal quotation marks and parallel citations omitted). Among the reasons for these rules of English law is

> the jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction. . . . [It is] not unreasonable to suppose that a desire to retain, if not to extend, the jurisdiction had much to do with inspiring the fear that arbitration tribunals could not do justice between the parties.

S. Rep. No. 536, 68th Cong., 1st Sess. 2-3 (1924); *see also* H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); David Margolick, *Chief Justice Proposes Arbitration To Stem "Avalanche" of Lawsuits*, N.Y. Times, Jan. 25, 1982, at A19 (In a speech to the American Bar Association, Chief

Justice Warren E. Burger "said that arbitration has been opposed by judges jealous of jurisdiction and lawyers fearful of losing business.").

The court's jurisdictional jealousy arises from a distrust of an arbitrator's abilities and a paternalistic belief that the contracting parties do not really know what is good for them. Such undercurrents of jurisdictional jealousy can be seen in the dissents of the decisions that bolster judicial respect for parties' agreements to arbitrate. *See, e.g., Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 9, 832 P.2d 899, 10 Cal. Rptr. 2d 183, 186 (1992) (Kennard, J., dissenting) ("The exercise of judicial power cannot be controlled or compelled by private agreement or stipulation."). This paternalism elevates governmental supervision over individual choice. Such indulgence in governmental supervision for its own sake ignores that "the basic rights of the individual are not created by the state, but are only protected by it." Ladd, "Introduction" to *I. Kant, The Metaphysical Elements of Justice*, xxii (J. Ladd trans. 1965). The Act precludes courts from invoking distrust of arbitration or a claim to exclusive jurisdiction to vitiate parties' contracts to arbitrate. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (ruling that the judiciary's interest in controlling the adjudication of antitrust claims did not outweigh the importance of effecting the parties' intent to arbitrate that issue: "the fundamental importance to American democratic capitalism of the regime of antitrust law . . . does not compel the conclusion that the treble damages remedy may not be sought outside an American court").

The court of appeal's suspicion of the AAA's financial interest provides a classic example of why Congress passed the Act to preserve the sanctity of arbitration. *See Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 1102-03, 40 Cal. Rptr. 2d 700, 710 (Cal. Ct. App. 1995). The court of appeal's reasoning is flawed because like the AAA, the judiciary also has a vested interest in assuring cases in its jurisdiction are administered smoothly. If the parties have, by contract, set the rules for their fight, it is for the court to enforce the rules rather than strain for reasons to avoid them. The court below begged the question when it noted, "[w]e perceive that arbitrator bias is a fundamentally different question from venue." *Id.* at 1102, 40 Cal. Rptr. 2d at 710. In both circumstances, the AAA is the entity to which the parties committed the decisions, and there is no basis for singling out the AAA's decision whether to disqualify an arbitrator. The court of appeal's judgment must derive from inappropriate jurisdictional jealously.[8]

In the end, accepting Britz's, or others', attack on conclusively decided arbitration issues will "scuttle the spirit of deference that courts have always used in reviewing arbitral awards." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995). Indeed, "[l]imited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation." *Id.* at 146. To hold otherwise is to succumb to the precise jurisdictional jealousies against which the Act was designed to protect.

---

[8] Given its vast experience with these issues, the AAA is, in fact, specially equipped to make judgments concerning nondisclosure and disqualification.

II.

DE NOVO REVIEW OF AN ARBITRATING BODY'S CONCLUSIVE DECISION DISTURBS THOUSANDS OF CONTRACTUAL RELATIONSHIPS WHICH DEPEND ON RESOLVING DISPUTES THROUGH EFFICIENT AND CERTAIN ARBITRATION.

De novo judicial review of conclusive decisions by the AAA casts doubt into thousands of business and other contractual relationships which depend on resolving disputes through arbitration. For the parties to these agreements, arbitration represents a quick, cost effective, and certain alternative to litigation in the courts. When courts fail to enforce parties' contractual provisions for arbitration, whether up front or through de novo review of arbitration decisions, parties lose confidence in the certainty of their agreements and in arbitration itself. In the present case, the parties contractually agreed to resolve their disputes outside the courts. Instead, the parties have endured protracted litigation. This Court should now alleviate the uneven interpretation of the law which plagues this area of great public importance, so parties can obtain the quick, cost effective, and certain results for which they contract. For the same reason, the Court should grant a writ of certiorari because this case raises important and pervasive issues concerning the administration of the Federal Arbitration Act. *See United States v. Ruzicka*, 329 U.S. 287, 288 (1946).

Although parties may seek judicial review of an award if the arbitrator's corruption or evident partiality is alleged, thousands of parties agree to avoid the specter of protracted and costly litigation by authorizing independent tribunals like the AAA to decide conclusively whether to disqualify an arbitrator. Thousands of these contracts contain provisions incorporating the AAA Commercial Arbitration Rules authorizing the AAA to decide conclusively

whether to disqualify an arbitrator following a party's objection. American Arbitration Association, *1994 Statistical Report* (1995). Each year, thousands of parties ask the AAA to administer their arbitrations; each can reasonably expect the AAA to decide conclusively whether arbitrators should be disqualified.

To realize their desired certainty, cost savings, and time efficiency, the parties must be guaranteed finality:

> The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. (*Utah Constr. Co. v. Western Pac. Ry. Co.* (1916), 174 Cal. 156, 159, 162 P. 631.) "Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." (*Blanton v. Womancare, Inc.* [(1985), 38 Cal. 3d 396,] 402, fn. 5, 212 Cal. Rptr. 151, 696 P.2d 645.)

Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 9, 832 P.2d 899, 903, 10 Cal. Rptr. 2d 183, 187 (1992). "This expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one." *Id.* at 10, 10 Cal. Rptr. 2d at 903, 832 P.2d at 187. The Act requires courts to enforce parties' intentions to avoid costly and time-consuming litigation:

> It is particularly appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (Jan. 24, 1924).

A court's de novo review of conclusive decisions by an independent tribunal violates the Act's purpose of enforcing parties' intentions to settle their disputes in this relatively quick and inexpensive manner. As one court stated:

> A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." . . . Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions.

Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (citation omitted), *cert. denied*, 115 S. Ct. 903 (1995).[9] If courts may review de novo decisions of an arbitrating

---

[9] The potential for a losing party's abuse of a liberal policy of review contributes to a lack of finality. A party may move to vacate an arbitration award simply as a tactical response to having lost the arbitration. Such a strategy increases the cost of resolving disputes and undermines the finality of arbitration, contrary to the parties' intentions and to the Act's purpose of making arbitration "a swift, inexpensive, and effective substitute for judicial dispute resolution." *Mertit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983). One court has noted:

> [P]ragmatic policy concerns support the hesitancy by courts to vacate awards on the basis of a failure of disclosure on the part of the arbitrators. The most obvious reason for this caution is the courts' concern that "a suspicious or disgruntled party can seize" upon an undisclosed relationship "as a pretext for invalidating the award."

Sanford Home for Adults v. Local 6, IFHP, 665 F. Supp. 312, 318 (S.D.N.Y. 1987).

body that the parties intended to be conclusive, parties lose the benefit of their bargains, and thousands of parties will lose confidence in the meaning of their contracts and the finality of arbitration. The Act lifts contracting parties out of such a quandary: a quandary exemplified by this case. Britz twice sought and twice received the AAA's conclusive ruling on the nondisclosure objection. Britz agreed in 1989 to be bound conclusively by the AAA's ruling on this issue. With its motion to vacate in the Superior Court, Britz sought to avoid the effects of its agreement to obey the AAA rules for arbitration. Although courts generally have frowned upon such efforts to take a "second bite at the apple" because of dissatisfaction with the outcome (*see, e.g., Remmey*, 32 F.2d at 146), the court below sanctioned Britz's conduct and sent the parties out to re-litigate a matter that should have been concluded long ago. The only rationale for this decision is the lower court's mistaken notion that a party's claim of impartiality automatically requires de novo review.

The court of appeal's ruling is the first to address directly whether a charge of bias automatically triggers de novo review. Yet, the court of appeal's de novo standard is so inconsistent with this Court's decisions that it will leave the purpose and meaning of the Act in a state of confusion and will lead to non-uniformity among courts. The uncertainty raised by different standards of review in different jurisdictions creates obstacles to conducting interstate business. Arguing to grant a petition for writ of certiorari in a similar case, Justice O'Connor, joined by the Chief Justice, commented on the need for uniformity in this area: "[t]he result is that courts in different jurisdictions reach contrary results . . . involving similarly situated parties and identical arbitration agreements. The Federal Arbitration Act was passed, in part, to prevent this kind of disarray." *J. Alexander Sec., Inc. v. Mendez*,

114 S. Ct. 2182, 2183 (1994) (O'Connor, J., dissenting). Businesses engaged in an interstate transaction must be able to rely on agreements to arbitrate to finality without undue interference from the judiciary.

This Court's word on judicial review of conclusive decisions by independent arbitrating bodies is important because the standard of review will affect businesses' decisions to arbitrate. There is a need for certainty in business transactions and relationships. As long as different courts use different standards of review, the right to enforce arbitration contracts and arbitration judgments will continue to depend "on the particular forum in which it is asserted." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). A ruling from this Court will put all courts and all arbitrating parties in a place of certainty on an issue affecting thousands of business and personal transactions within and across the United States.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

MICHAEL DOCKTERMAN
(Counsel of Record)
CRAIG M. WHITE
THOMAS J. VERTICCHIO
WILDMAN, HARROLD, ALLEN
& DIXON
225 West Wacker Drive
Suite 3000
Chicago, Illinois 60606-1229
(312) 201-2000

Attorneys for Petitioners

Supreme Court, U.S.
FILED
(2)
95-725 NOV 6 - 1995
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO., and ALFA-LAVAL CREDIT AB,

Petitioners,

v.

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

MICHAEL DOCKTERMAN
(Counsel of Record)
CRAIG M. WHITE
THOMAS J. VERTICCHIO
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Suite 3000
Chicago, Illinois 60606-1229
(312) 201-2000
Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

10

INDEX TO APPENDIX

	App. Page
Decision of the Court of Appeal of California	1
Order of the Supreme Court of California	29
Britz's Memorandum of Points and Authorities in Opposition to Petition to Compel Arbitration ..	30
Alfa-Laval's Reply to Memorandum in Opposition to Petition to Compel Arbitration	43
Letter from Rocco M. Scanza of the AAA to Messrs. White, Dockterman, Kaplan and Frame dated August 4, 1992 denying Britz's request to disqualify the arbitrator	56
Letter from Rocco M. Scanza of the AAA to Messrs. White, Dockterman, Kaplan, Frame, Vorzimer, Cotkin and Dolinsky dated February 18, 1993 reaffirming the arbitrator	58
Order of the Superior Court confirming arbitration award	60
Judgment of the Superior Court	63
Modification Order of Court of Appeal of California	65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO., and ALFA-LAVAL CREDIT AB,

Petitioners,

v.

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

BRITZ, INC. et al., Plaintiffs and Appellants,

v.

ALFA-LAVAL FOOD & DAIRY CO. et al., Defendants and Respondents.

No. F020306.

Court of Appeal, Fifth District.

May 8, 1995.

* * * * *

OPINION

VARTABEDIAN, Associate Justice.

This is an appeal from a judgment confirming an arbitration award. Appellants primarily contend that arbitration should not have been compelled in the first instance and that the arbitrator failed to disclose certain conflicts of interest. We reverse the judgment and remand the matter to superior court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

The Underlying Controversy.

The merits of the underlying controversy are not before us in this appeal. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Accordingly, we only briefly summarize the rather complex facts.

Appellants are interrelated corporations that, in various combinations, contracted with respondents to buy and lease certain machines and equipment essential to the operation of a tomato paste processing plant. The total sale/lease price exceeded $1.5 million.

The plant never reached its production goals and appellants closed the plant during its first season of operation. They sold the plant at a substantial loss. They then sued respondents in Fresno County Superior Court for more than $10 million in compensatory and exemplary damages.

The Arbitration.

The sales and lease contracts contained arbitration clauses. Respondents moved in the superior court for an order staying appellants' lawsuit and compelling arbitration of the dispute. Appellants contested this motion. The motion was granted.

The arbitration was to be conducted through the American Arbitration Association (AAA). Pursuant to a list of potential arbitrators submited by AAA, the parties agreed to the appointment of a single arbitrator, John Peterson, a Fresno attorney.

The arbitration was bifurcated. The liability portion began on January 6, 1992. The arbitrator issued an interim award in favor of respondents on May 22, 1992. He issued a final award in favor of respondents in the amount of $587,425, plus costs and attorney fees in an unspecified amount, on March 31, 1993. The award was served by mail on the parties on April 6, 1993. After additional submissions by the parties, the arbitrator on May 6, 1993, issued a supplemental award of $1,412,953.75 for respondents' attorney fees and $696,747.45 as costs.

The Controversy About the Arbitrator's Neutrality.

Respondents were represented in the initial superior court proceedings by McCormick, Barstow, Sheppard, Wayte & Carruth, a Fresno law firm (McCormick). Attached to their petition to compel arbitration was a copy

of a demand for arbitration filed with AAA. That document named as respondents' attorneys Craig M. White and Michael Dockterman of Chicago, Illinois. White and Dockterman are with the Chicago law firm of Wildman, Harrold, Allen & Dixon (Wildman). With one important exception, the Wildman firm, not McCormick, appeared for respondents in the arbitration. When the matter returned to superior court after the arbitration, both McCormick and Wildman appeared for respondents.

After Peterson issued his interim award in favor of respondents, appellants requested that Peterson disclose all past and present relationships with the McCormick firm. Eventually, Peterson did so. The relationships included a number of referrals of legal business to Peterson and his firm from McCormick in the ordinary course of business. These did not involve any financial relationship between the two firms.

Peterson also disclosed that in 1984 he had been retained by McCormick as an expert witness in a legal malpractice case McCormick was defending on behalf of another Fresno law firm. In addition, Peterson disclosed that in November of 1991 and December of 1991 he had been retained by McCormick as an expert witness in two other legal malpractice cases in which McCormick represented law firm defendants. He was still involved in the 1991 cases at the time of the disclosure.

In November 1991, attorneys from McCormick tried to have a subpoena issued by the superior court for the production of documents by a third party involved in construction of appellants' tomato processing plant. The superior court declined to issue the subpoena; it instructed respondents to seek the subpoena from the arbitrator. This gave rise, on December 2, 1991, to the only appearance in the arbitration by a McCormick attorney.

On that date, attorney John T. Savrnoch of McCormick mailed to Peterson a three-page letter on McCormick letterhead. The letter referenced the pending arbitration and requested issuance of a subpoena on behalf of respondents, explaining in detail the importance of the requested materials to respondents' arbitration presentation. The letter included the following statement: "By this letter, the attorneys for Alfa-Laval respectfully request that a records only deposition subpoena be served upon L & A Engineering, Inc. for the following documents. . . ." Peterson granted the request for subpoena by means of a letter from Peterson to McCormick, with joint addressees Wildman, appellants' attorney, and the attorney for L & A Engineering.[1]

Peterson disclosed his role as an expert witness for McCormick on July 9, 1992, and, in greater detail, on July 15, 1992. Based on this relationship and the referrals of cases to Peterson and his firm by McCormick, appellants requested appointment of a new arbitrator by letter to AAA dated July 21, 1992. AAA, after soliciting input from respondents and Peterson, declined on August 4, 1992, to disqualify Peterson. The AAA decision did not contain a statement of reasons.

Appellants sought relief in their superior court and by petition for extraordinary writ in this court. All of appellants' efforts were unsuccessful.

Peterson presided over the damages portion of the arbitration beginning February 22, 1993.

---

[1] Appellants' motion to augment record on appeal, filed July 19, 1994, is denied. Appellants' request for judicial notice (Mar. 24, 1995) and respondents' motion to augment record on appeal (Mar. 28, 1995) are granted.

Postarbitration Proceedings in Superior Court.

Appellants renewed their petition to vacate the arbitrator's award on April 21, 1993, noticing a hearing for May 28, 1993, in superior court. They alleged Peterson's various connections with McCormick created a reasonable impression of possible bias on Peterson's part. Respondents petitioned to affirm the award. Both parties submitted declarations of various attorneys. The parties also relied on Peterson's letter of July 9, 1992, in which he states:

> "In the past, when I have arbitrated a matter involving a party represented by the McCormick, Barstow firm, I have advised the American Arbitration Association that I have been on McCormick, Barstow's referral list. I would have done so in this case had I believed that McCormick, Barstow represented Alfa-Laval in the arbitration, or in any other capacity.
>
> ". . . I knew in April 1991 that McCormick, Barstow had represented Alfa-Laval in the Superior Court action. To the best of my knowledge then, and since then, McCormick, Barstow was not to be, and was not, involved in the arbitration."

The trial court conducted a law and motion hearing on the petitions to vacate and to confirm the award. The court determined that AAA's disposition of appellants' request for Peterson's disqualification was subject to only the limited judicial review available for factual and legal determinations of the arbitrator. In accordance with that standard, the court determined AAA's resolution of the conflict issue was a "plausible interpretation of the law and facts and was rendered with a minimum standard of fair dealing." Secondarily, the court concluded that appellants and their attorney had sufficient information before Peterson was selected as arbitrator about Peterson's relationship with McCormick to place upon appellants a duty of inquiry concerning these relationships; by failing to in-

quire in a timely manner, appellants waived objection to both types of relationships, the business referrals and the expert witness employment.

The court dismissed appellants' petition to vacate the arbitrator's award and granted respondent's petition to confirm the award, including attorneys fees and costs, with interest from the date of the award through entry of judgment. Judgment was entered on July 16, 1993. The total judgment was for $2,732,477.51, plus costs of the superior court proceedings.

Appellants filed a timely notice of appeal on September 14, 1993.

DISCUSSION

The parties impliedly agree that this case is governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (the Act). (See 9 U.S.C. § 2 [the Act covers arbitration arising from a "written provision in . . . a contract evidencing a transaction involving (interstate) commerce. . . ."].) "Generally, under the Act, arbitration is strongly favored, and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . .' [Citations.]" (*Rice v. Dean Witter Reynolds, Inc.* (1991) 235 Cal.App.3d 1016, 1023, 1 Cal.Rptr.2d 265.)

The Act, however, provides that an arbitration clause is not enforceable if "grounds as exist at law or in equity for the revocation of any contract" permit relief from the arbitration clause. (9 U.S.C. § 2; see Code Civ. Proc., § 1281.) We will turn first, therefore, to appellants' contention that such grounds exist and that the trial court impermissibly compelled arbitration of the present dispute. After concluding that arbitration was properly ordered,

we will address appellants' contention that the business relationships between Peterson and McCormick created a reasonable appearance of bias. We will conclude with a brief discussion of appellants' remaining points on appeal.

I. *Prearbitration Issues: Was the Order for Arbitration Proper?*

Appellants contend the trial court erred in ordering arbitration of their claims against respondents. Appellants argue they were entitled to judicial resolution of the disputes because the arbitration clauses in the contracts were void: "fraud permeated the entire contracts, including their arbitration provisions. The fraud was directed 'not only to the contracts as a whole, but to the agreements to arbitrate as well.' "

The fraud alleged by appellants is set forth in the complaint and in declarations by appellants' representatives who negotiated the contracts. These documents allege that critical representations made as to the performance and maintenance requirements of certain machines were false. They allege the representations were intended to induce, and did induce, appellants to enter into the contracts to buy and lease the machines. The complaint then states: "The false representations went not only to the contracts as a whole, but to the agreements to arbitrate, as well. Plaintiffs were led to believe by defendants that plaintiffs had to agree to arbitration as a *sine qua non* for acquisition of the equipment, bags and filling machines." Neither the complaint nor the declarations allege that this

latter representation by appellants, i.e., that there could be no contract without an arbitration clause, was false.[2]

It has long been established that fraud of the sort alleged by appellants does not prevent enforcement of an arbitration clause in a contract, even though the contract as a whole might be revocable due to the fraud. The seminal case is *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270. In that case, defendant sold plaintiff a paint manufacturing business. Collateral to the sales contract, plaintiff entered into another contract retaining defendant as a business consultant. The consulting contract contained an arbitration clause. (388 U.S. at pp. 397-398, 87 S.Ct. at pp. 1802-1803.)

When a dispute arose under the contract, plaintiff sued in federal district court for rescission on the basis of fraud. Plaintiff contended defendant had falsely represented that it was not insolvent. (388 U.S. at p. 398, 87 S.Ct. at p. 1803.) Defendant petitioned the court to compel arbitration of the dispute. The federal district court granted the petition and the Court of Appeals affirmed. (*Id.* at pp. 399-400, 87 S.Ct. at pp. 1803-1804.)

The issue before the Supreme Court was whether under the Act the enforceability of the arbitration clause depended on the validity of the contract containing the arbi-

---

[2] For the first time, in appellants' reply brief, there is the statement that appellants were "told that, to obtain the Alfa-Laval system and Alfa-Laval's expertise, it had to agree to arbitration. [Record cite to declarations.] Indeed, *these statements were as false* as Alfa-Laval's earlier statements that its equipment was highly reliable. . . ." (Emphasis added.) There is no record citation for this latter claim, and the citation to the opening brief is to a discussion of the representations about the machines, not about the necessity of agreeing to an arbitration clause.

tration clause, that is, whether the plaintiff was entitled to a judicial determination of its claim for rescission, or whether that was an issue for the arbitrator. (388 U.S. at p. 402, 87 S.Ct. at p. 1805.) The court concluded: "[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." (*Id.* at pp. 403-404, 87 S.Ct. at p. 1806, fn. omitted; see also *Moses H. Cone Hospital v. Mercury Const. Corp.* (1983) 460 U.S. 1, 22-23, fn. 27, 103 S.Ct. 927, 940-941, fn. 27, 74 L.Ed.2d 765; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322, 197 Cal.Rptr. 581, 673 P.2d 251 [adopting same standard under Code Civ.Proc. § 1208 et seq.].)

Appellants contend they have satisfied the requirement for judicial determination of their right to rescind the contracts: "The Federal Arbitration Act also requires that, in the face of allegations that fraud induced the arbitration agreement, the parties are entitled to have a jury decide whether a valid agreement to arbitrate exists." This contention is mistaken.

The allegations in the present case are the same as in *Prima Paint, supra*, 388 U.S. 395, 87 S.Ct. 1801, namely, that the contracts generally were a result of respondents' fraud. There is no allegation whatsoever that appellants were fraudulently induced to enter into the arbitration agreements in any way different from the way they were induced to pay money or make other agreements under the contracts. The only fraud alleged is as to the contracts generally.

The present case is wholly different from the cases appellants cite in which the issue of fraud was judicially determined. In some of those cases, the plaintiff did not know he or she was entering into a contract at all, or did not know it contained an arbitration clause. (See *Strotz v. Dean Witter Reynolds, Inc.* (1990) 223 Cal.App.3d 208, 217-218, 272 Cal.Rptr. 680 ["plaintiff has alleged that defendants deceived her as to the nature and effect of the documents"]; *Ford v. Shearson Lehman American Express, Inc.* (1986) 180 Cal.App.3d 1011, 1028-1029, 225 Cal. Rptr. 895; *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 30, 32, 136 Cal.Rptr. 378; see also *Rice v. Dean Witter Reynolds, Inc., supra,* 235 Cal.App.3d at pp. 1024-1025, 1 Cal.Rptr.2d 265.[3]) In the other case appellants cite, *Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 71, 254 Cal.Rptr. 689, plaintiff alleged the contract in question was illegal and that the pervasive illegality eviscerated the arbitration clause. (See *id.* at p. 73, 254 Cal.Rptr. 689.)

In the present case, there is no allegation appellants did not know what they were signing, that they signed under duress, or that the contracts were illegal. Instead, the allegations show that in order to secure a competitive advantage in the tomato paste industry, appellants agreed to buy and lease respondents' machines and to arbitrate disputes with respondents. Whether the purchase, lease and arbitration agreements were fraudulently induced was

---

[3] One recent case, citing all of the foregoing cases in support of its conclusion, stated: "California cases are unanimous in holding that *Prima Paint* does not require arbitration where, as alleged here, the plaintiffs were so deceived they did not understand they were contracting." (*Lynch v. Cruttenden & Co.* (1993) 18 Cal.App. 4th 802, 811, 22 Cal.Rptr.2d 636.)

a question properly determined by arbitration. (*Lynch v. Cruttenden & Co., supra,* 18 Cal.App.4th at p. 810, 22 Cal.Rptr.2d 636.)

II. *Postarbitration Issues.*

A. *Waiver of the Arbitrator's Alleged Conflict of Interest.*

Appellants learned the full extent of Peterson's contact with McCormick after they lost the liability portion of the arbitration. At that time, appellants sought disqualification of Peterson and appointment of a new arbitrator. They sought this relief from the AAA, the trial court, this court (by writ petition) and, finally, by renewed petition in the trial court to vacate the final arbitration award. Appellants' requests were denied.

Appellants now raise the conflict of interest issue on this appeal. Respondents contend that, as the trial court found, appellants waived this issue when they initially accepted Peterson as the arbitrator without any inquiry concerning his contact with McCormick.

In some measure, we agree with respondents. It is clear from the undisputed evidence that one of appellants' officers (Glassman) and their attorney (Frame) both knew that Peterson's firm received business referrals from McCormick. There is nothing in Peterson's subsequent disclosures that indicates the more recent referrals were different in kind or frequency from the pattern of referrals of which appellants were generally aware. As to those matters, appellants selected Peterson as arbitrator without seeking further disclosure. This waived appellants' objection to Peterson based on his failure to disclose business referrals. (*Health Services Management Corp. v. Hughes* (7th Cir. 1992) 975 F.2d 1253, 1262-1263.)

When we turn to the expert witness relationship, however, we must agree with appellants that the trial court erred as a matter of law. No substantial evidence supports a finding that appellants waived this basis for Peterson's disqualification.

Common sense and experience tell us there is a vast difference between a relationship six years dormant, about which appellants knew, and a current and thriving relationship, about which appellants knew nothing prior to the arbitration. The relationship about which appellants knew was much the same as the relationship between the arbitrator and the party in *Merit Insurance Co. v. Leatherby Ins. Co.* (7th Cir. 1983) 714 F.2d 673. In that case, 14 years before the arbitration, the arbitrator had been a subordinate employee of the president of one of the parties to the arbitration, when both men had worked for a different insurance company. (*Id.* at p. 680.) The arbitrator failed to disclose that information. In rejecting a subsequent motion to vacate the arbitration award, the court concluded, "And when a former employee sits in judgment on a former employer there is no presumption that he will be biased in favor of the former employer; he may well be prejudiced against him." (*Ibid.*)

So, too, in the present case. Appellants may well have concluded that the isolated nature of Peterson's previous experience as a witness for McCormick may have left him slightly bitter about that firm, or at least devoid of positive feelings. He was, after all, never again asked to serve as an expert witness for McCormick, as far as appellants knew.

By contrast, the new engagements, coming just a few weeks before the commencement of the arbitration, established a current monetary connection between Peterson

and McCormick. Such a relationship, as a matter both of perception and of reality, is wholly different from the 1984 employment about which appellants had knowledge. We conclude the earlier service as an expert witness did not put appellants on notice there might be a current relationship with McCormick; appellants were entitled to rely on Peterson's duty to disclose. (See *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 937, 20 Cal.Rptr.2d 841; compare *Betz v. Pankow* (1995) 31 Cal.App.4th 1503, 38 Cal.Rptr.2d 107 [duty *to investigate* for conflicts is narrower than duty *to disclose* known conflicts]; *San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co.* (1972) 28 Cal.App.3d 556, 569, 104 Cal.Rptr. 733 [same].)

As a practical matter, of course, appellants had no choice but to rely on Peterson for voluntary disclosure. Even if appellants had assumed the obligation to inquire about current employment by McCormick at the time of Peterson's appointment as arbitrator, Peterson would have answered truthfully that there was no such employment. The employment arose months later, in circumstances appellants could not reasonably have anticipated when they agreed to Peterson as the arbitrator.

The practical view of the matter—that the conflict information is usually known only to the arbitrator and the opposing party—has led to a consistent line of cases holding that the arbitrator has a duty to disclose potential conflicts of interest. (See *Commonwealth Corp. v. Casualty Co.* (1968) 393 U.S. 145, 149, 89 S.Ct. 337, 339, 21 L.Ed.2d 301;[4] *Kaiser Foundation Hospitals, Inc. v. Superior Court* (1993) 19 Cal.App.4th 513, 517, 23 Cal.Rptr. 2d 431; *Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.

[4] Also cited as *Commonwealth Coatings Corp. v. Continental Casualty Co.*

3d 345, 371, 133 Cal.Rptr. 775; *Johnston v. Security Ins. Co.* (1970) 6 Cal.App.3d 839, 842, 86 Cal.Rptr. 133.) While "the consequences of such a failure [to disclose] may be overcome if the pertinent facts are actually revealed, or otherwise become known, to the parties in some other fashion" (*Kaiser Foundation Hospitals, supra,* at p. 517, 23 Cal.Rptr.2d 431), the outdated and ambiguous information appellants possessed about Peterson's service as an expert witness did not adequately supplant the duty to disclose in this case. (See *ibid.*)

In summary, appellants knew the essence of one basis for objection to Peterson's qualifications as arbitrator, namely, the referral of cases between Peterson and McCormick in the ordinary course of business. Accordingly, that objection was waived by the failure to pursue it prior to Peterson's appointment as arbitrator. (*Health Services Management Corp. v. Hughes, supra,* 975 F.2d 1253 at pp. 1262-1263; see *Ray Wilson Co. v. Anaheim Memorial Hosp. Assn.* (1985) 166 Cal.App.3d 1081, 1089-1090, 213 Cal.Rptr. 62.) The objection based on Peterson's enlistment by McCormick as an expert witness in November and December of 1991, however, was not waived. (*Kaiser Foundation Hospitals v. Superior Court, supra,* 19 Cal. App.4th at p. 517, 23 Cal.Rptr.2d 431.) Our discussion of the ramifications of Peterson's relationship with McCormick will address only that latter relationship.

B. *The AAA Determination and the Standard of Judicial Review.*

Rule 19 of AAA Rules of Commercial Arbitration provides:

> "Disclosure and Challenge Procedure—Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality,

> including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive."

In the present case, appellants "object[ed] . . . to the continued service" of the arbitrator and the AAA "determine[d] whether the arbitrator should be disqualified." It determined Peterson was not disqualified to conduct the arbitration. The next issue we address is the standard for judicial review of that determination.

Respondents assert, and the trial court agreed, that the determination of arbitrator bias was entitled to the same degree of finality that is afforded any other issue submitted for determination by an arbitrator. Respondents therefore contend the AAA decision on this issue must be upheld if it "represents a 'plausible interpretation' of the law and fact and was reached in accordance with a 'minimum standard of fair dealing.' " Appellants contend the trial court should have reviewed the issue of arbitrator bias de novo.

Moncharsh v. Heily & Blase, supra, 3 Cal.4th at p. 11, 10 Cal.Rptr.2d 183, 832 P.2d 899, was decided under the California Arbitration Act. However, in an extended section entitled "The General Rule of Arbitral Finality," the Supreme Court relied upon cases arising under the Federal Arbitration Act as the basis for its discussion and conclusions. The court's analysis in *Moncharsh* provides a useful starting point for our discussion.

"Thus, both because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, 'The merits of the controversy between the parties are not subject to judicial review.' . . .

"Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law. In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable for two reasons. First, by voluntarily submitting to arbitration, the parties have agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute. . . .

" . . . . . .

"*A second reason why we tolerate the risk of an erroneous decision is because the Legislature has reduced the risk to the parties of such a decision by providing for judicial review in circumstances involving serious problems* with the award itself, or *with the fairness of the arbitration process.* [Citing to Code Civ.Proc., §§ 1286.2, subds. (a)-(c)]" (3 Cal.4th at pp. 11-12, 10 Cal.Rptr.2d 183, 832 P.2d 899, italics added.)

A similar theme is apparent in *Commonwealth Corp.* There, the majority opinion emphasizes the importance of a neutral and detached arbitrator, since arbitrators "have completely free rein to decide the law as well as the facts and are not subject to appellate review." (*Commonwealth Corp., supra,* 393 U.S. at p. 149, 89 S.Ct. at p. 339.)[5]

[5] Even in those federal courts that have taken the narrowest possible view of the grounds for disqualification under the Act, there is still an emphasis on independent review of the issue of arbitrator bias and appearance of bias. Thus in *Merit Insurance Co.*

(Footnote continued on following page)

Our research and that of the parties has unearthed but two cases directly addressing the issue of finality of the arbitration administrator's determination of disqualification. Neither is helpful.

In *Van Syoc v. Walter* (App.Div. 1992) 259 N.J.Super. 337, 613 A.2d 490, the Appellate Division of the Superior Court, without discussion or citation of relevant authority, applied the following standard of review: "The trial judge's conclusion that plaintiffs had failed to show that the AAA did not, as a matter of law, act arbitrarily or capriciously is fully supported by the record." (*Id.* 613 A.2d at p. 492.)

In *Freeport Constr. Co. v. Star Forge, Inc.* (1978) 61 Ill. App.3d 999, 19 Ill.Dec. 57, 59, 378 N.E.2d 558, 560, the court held that the state arbitration statute, which used the same language about arbitrator bias as the Act, required de novo consideration of a bias claim. However, the court noted that the AAA rules in question, those for the construction industry, did not assert the finality of any AAA determination on disqualification.

Nor do we find helpful the cases engaging in limited judicial review of arbitration decisions that respondents say are analogous to a disqualification determination. Many of respondents' cases, such as *Orion Pictures v. Writers Guild of America* (9th Cir. 1991) 946 F.2d 722, are labor relations cases arising under the federal Labor

---

[5] *continued*

v. Leatherby Insurance Co., supra, 714 F.2d 673, 680, the court wrote: "Although we have great respect for the Commercial Arbitration Rules and the [AAA] Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award's validity under section 10 of the [federal act]. The arbitration rules and code do not have the force of law."

Management Relations Act (LMRA) (29 U.S.C. § 185). The issue in those cases is whether the parties have presented an arbitrable issue. The LMRA permits this prearbitration determination to be made by a federal district court or by the arbitrator, at the parties' election. (See *George Day Const. Co., Inc. v. United Broth. of Carpenters* (9th Cir. 1984) 722 F.2d 1471, 1474-1475.) The cases merely stand for the proposition that a party which elects one forum will not be permitted to turn to the alternative forum later in the proceedings for a de novo determination of arbitrability. (*Id.* at p. 1475.) The Federal Arbitration Act contains no such provision for an election by the parties to have a court determine issues of arbitrator bias before or during an arbitration proceeding; accordingly, the labor law cases on the question of arbitrability are distinguishable.

The nonlabor case upon which respondents rely is *Aerojet-General Corp. v. American Arbitration Ass'n* (9th Cir. 1973) 478 F.2d 248, 252. There, the arbitration rules provided that AAA would choose the venue for arbitration if the parties could not agree. Plaintiff disagreed with AAA's choice of New York, and sued in federal district court in California for an injunction against the New York arbitration. On appeal from an order granting the preliminary injunction, the Court of Appeals reversed.

First, the court noted that the case before it concerned interlocutory judicial intervention in the arbitration. Such interlocutory review was to be available, "if at all, only in extreme cases." (478 F.2d at p. 251.) The court also noted "It was part of the arbitration agreement that the AAA could select a locale for the arbitration if the parties failed to agree on one. . . . When the parties to a contract agree that a factual determination is to be made by a neutral third party that determination is upheld in

the absence of fraud or gross mistake as would necessarily imply bad faith." (478 F.2d at p. 252, fn. 5.)

However, the court also distinguished questions of arbitrator bias from the venue question before it: "An arbitration award must be upheld unless it be shown that there was partiality on the part of an arbitrator [citing *Commonwealth Coatings Corp. v. Continental Casualty Co.*, *supra*, 393 U.S. 145, 89 S.Ct. 337], or that the arbitrator exceeded his authority [citation], or that the award was rendered in 'manifest disregard of the law.' " (*Aerojet-General Corp.*, *supra*, 478 F.2d at p. 252.)[6]

We perceive that arbitrator bias is a fundamentally different question from venue. The AAA has no vested interest in issues of venue. However, in the present case AAA's agent or employee may have been the cause of a significant waste of time and money for the parties to the arbitration, if he failed in his duty to disclose and had to be removed from the arbitration. At the very least, removal of the arbitrator could involve thorny issues about who was to pay for the arbitrator's time up to his removal from the case.

---

[6] Similarly in *Bernard v. Hemisphere Hotel Management* (1983) 16 Mass.App.Ct. 261, 450 N.E.2d 1084, the issue was not appearance of bias, but rather the arbitrator's fitness for the position. After the arbitration commenced, it became known the neutral arbitrator on a three-man panel was a convicted felon who had misspelled his name on his biography to hide that fact. On appeal from a trial court order directing the AAA to handle disqualification proceedings in a certain manner, the appellate court wrote that the matter of arbitrator qualifications should be left to AAA with very limited judicial review. The court then stated that, by contrast to the issue of qualifications, "[p]artiality of a neutral arbitrator, however, is one of several post-award issues over which courts have power of decision by statute." (*Id.* 450 N.E.2d at p. 1086.)

It must be remembered that, even though state and federal policy favors private arbitration and the AAA is certainly a respected forum for such arbitration, AAA nevertheless is a business enterprise "in competition not only with other private arbitration services but with the courts in providing—in the case of private services, selling—an attractive form of dispute settlement. It may set its standards as high or as low as it thinks its customers want." (*Merit Ins. Co. v. Leatherby Ins. Co.*, *supra*, 714 F.2d at p. 681.) We cannot ignore the fact that AAA has its own vested interest in a midarbitration declaration of arbitrator disqualification, an interest AAA does not have in such issues as venue and arbitration procedures.

In light of the explicit statutory authorization of judicial determination of "evident prejudice" of arbitrators as interpreted in *Commonwealth Corp.*, *supra*, 393 U.S. 145, 89 S.Ct. 337 we hold that a trial court considering a petition to confirm or vacate an arbitration award is required to determine, de novo, whether the circumstances disclose a reasonable impression of arbitrator bias, when that issue is properly raised by a party to the arbitration.

The trial court in the present case reached the opposite conclusion, favoring limited review of the AAA decision on the issue of appearance of bias. Accordingly, we find it necessary to remand this matter to the trial court for "an evidentiary hearing [at which] the full extent and nature of the relationships at issue may be ascertained." (*Sanko S.S. Co., Ltd. v. Cook Industries, Inc.* (2d Cir. 1973) 495 F.2d 1260, 1263.][7]

---

[7] We decline respondents' invitation to make our own de novo review of the "appearance of bias" issue. For reasons described below, resolution of this issue in respondents' favor requires a determination of credibility of witnesses particularly appropriate to a trial court proceeding. (See *Overseas Private Inv. Corp. v. Anaconda Co.* (D.D.C. 1976) 418 F.Supp. 107, 110-111.)

C. *Did the Arbitrator Have a Duty to Disclose His Employment as McCormick's Expert Witness?*

This is a nondisclosure case. It is not a case in which actual bias is alleged. Accordingly, its resolution is guided by *Commonwealth Corp., supra*, 393 U.S. 145, 89 S.Ct. 337. The majority opinion in that case states:

> "[The Act shows] a desire of Congress to provide not merely for *any* arbitration but for an impartial one. It is true that petitioner does not charge before us that the third arbitrator was actually guilty of fraud or bias in deciding this case, and we have no reason, apart from the undisclosed business relationship, to suspect him of any improper motives. But neither this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years. We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge. . . . [W]e can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of 'evident partiality' or the use of 'undue means.' . . . We can perceive no way in which the effectiveness of the arbitration process will be hampered by **the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.**" (*Id.* at pp. 147-149, 89 S.Ct. at pp. 338-339, emphasis added; see also *Overseas Private Inv. Corp. v. Anaconda Co., supra*, 418 F.Supp. at p. 110.)

After a thorough review of the cases interpreting *Commonwealth Corp.*, the Ninth Circuit Court of Appeals recently summarized the current state of the law in nondisclosure cases: "Other courts facing the same issue have held that 'evident partiality' is present when undisclos-

ed facts show 'a reasonable impression of partiality.' " (*Schmitz v. Zilveti* (9th Cir. 1994) 20 F.3d 1043, 1046.) " 'Reasonable impression of partiality' . . . is the best expression of the *Commonwealth Coatings* court's holding." (*Id.* at p. 1047.) As phrased by the California Court of Appeal, an arbitrator is "under a legal duty to 'disclose to the parties any dealings that might create an impression of possible bias' " (*Johnston v. Security Ins. Co., supra*, 6 Cal.App.3d at pp. 843-844, 86 Cal.Rptr. 133; see also *Betz v. Pankow, supra*, 16 Cal.App.4th at p. 936, 20 Cal.Rptr.2d 841.)

The parties acknowledge that the foregoing standard establishes the duty of an arbitrator to disclose his business relationships to AAA and to the parties. Similarly, both parties impliedly acknowledge that *if* McCormick had participated in the arbitration hearing on behalf of respondents, nondisclosure of the expert witness relationship would have created a reasonable impression of partiality.[8] (See *Wheeler v. St. Joseph Hosp., supra*, 63 Cal.App.3d 345, 133 Cal.Rptr. 775 [physician arbitrator had served as medical expert witness for the attorneys for a party to the arbitration; award for that party vacated].) The fundamental point of disagreement between the parties arises from McCormick's more limited representation of respondents.

The record is clear that McCormick litigated against appellants and their arbitration attorneys in the trial court, both before and after the court directed the matter to arbitration. The record is also clear that McCormick did

---

[8] Respondents' agreement on this point is, of course, qualified by their contention that appellants waived this claim by failing to act on their knowledge concerning Peterson's earlier employment as an expert witness.

not conduct the arbitration hearing on behalf of respondents; that was Wildman's job.

Yet the record is also clear that, on December 2, 1991, John T. Savrnoch of McCormick mailed to Peterson a three-page letter on McCormick letterhead. The letter referenced the pending arbitration and requested issuance of a subpoena on behalf of respondents. This letter did not make reference to any limitation on McCormick's representation of respondents. Instead, it discussed matters of strategy and preparation for the arbitration hearings. The letter concludes: "By this letter, the attorneys for Alfa-Laval respectfully request that a records only deposition subpoena be served upon L & R Engineering, Inc. for the following documents. . . ." Respondents have not directed our attention to a substitution of counsel or any other prearbitration document that informs the arbitrator McCormick no longer represented respondents. It does appear from the record on appeal, however, that McCormick was not on the arbitrator's mailing list for subsequent correspondence in the arbitration.

Peterson apparently received and reviewed the December 2, 1991, letter: A response to the letter, over Peterson's signature, was directed to McCormick's attorney, as well as to the other relevant persons, including attorneys at Wildman. There is no express representation in Peterson's disclosure letters that he did not see the December 2, 1991, letter. Yet, if Peterson did review the December 2 letter, there is no explanation in the record for his repeated representation that he was unaware of McCormick's representation of respondents. And, if Peterson did review the letter and his response to it, there is no explanation how he knew prior to the hearing itself on January 6, 1992 (i.e., during the time when disclosure would have been required), that McCormick would not be

participating. (See Peterson letter, excerpted at p. 704, *ante.*)

On remand, the trial court will be required to determine what Peterson knew and when he knew it. The court will then be required to make a de novo determination of whether the circumstances give rise to a reasonable impression of possible bias. The question before the court will not be, as in most cases, whether the relationship *between the arbitrator and the attorneys* is substantial enough to raise questions. (Compare *Banwait v. Hernandez* (1988) 205 Cal.App.3d 823, 830-831, 252 Cal.Rptr. 647.) It is. (*Wheeler v. St. Joseph Hospital, supra,* 63 Cal. App.3d at p. 372, 133 Cal.Rptr. 775.) Instead, the question is whether the relationship *between the attorneys and the party* to the arbitration is substantial enough to create a reasonable impression of possible bias on the part of the arbitrator.

D. *Did the Arbitrator Have Jurisdiction To Award Attorneys Fees and Costs?*

Appellants contend the arbitrator did not have jurisdiction to award attorney fees and costs. As to both items, appellants contend the award was made more than 30 days after the matter was submitted to the arbitrator for decision. Since the submission established a time within which the arbitration would be concluded by final award, appellants argue that the arbitrator's jurisdiction expired on that date.[9]

---

[9] Secondarily, appellants argue that the arbitration clause of the contract did not mention "costs," and "There is consequently no support in the parties' agreements for an award of costs to Alfa-Laval." This issue was conclusively resolved against appellants by

(Footnote continued on following page)

As respondents argue, however, the fundamental fallacy in appellants' argument is that costs and fees *were* awarded in the initial award, entered well within the 30-day jurisdictional period. The final award provides, "Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., is awarded its attorneys' fees and costs of suit, as against Helm Concentrates, Inc., and Britz, Inc., to be made by supplemental award following receipt and analysis of supporting declaration(s) from attorneys for Alfa-Laval Food and Dairy Co."

Appellants rely on Code of Civil Procedure section 1283.8[10] and cases applying predecessor versions of that section (see, e.g., *Librascope, Inc. v. Precision Lodge No. 1600, Internat. Assn. of Machinists* (1961) 189 Cal.App.2d 71, 76-77, 10 Cal.Rptr. 795) for the proposition that the

---

[9] *continued*

the Supreme Court's decision in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 383, 36 Cal.Rptr.2d 581, 885 P.2d 994, decided after briefing in the present case was completed.

Advanced Micro Devices held that arbitrators "enjoy the authority to fashion relief they consider just and fair under the circumstances existing at the time of the arbitration, so long as the remedy may be rationally derived from the contract and the breach." Since costs would be awarded to the prevailing party under Code of Civil Procedure section 1032 if this matter had proceeded to superior court trial, such an award is clearly related to the full compensation of respondents for appellants' breach of the contracts, even if the precise costs awarded by the arbitrator could not have been awarded by a court.

[10] Section 1283.8 provides: "The award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration. The parties to the arbitration may extend the time either before or after the expiration thereof. A party to the arbitration waives the objection that an award was not made within the time required unless he gives the arbitrators written notice of his objection prior to the service of a signed copy of the award on him."

30-day award requirement is jurisdictional. Assuming that the procedural requirements of the California Arbitration Act contained in the Code of Civil Procedure govern these proceedings (see *Volt Info. Sciences, Inc. v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 476-478, 109 S.Ct. 1248, 1254-1255, 103 L.Ed.2d 488), the defect in the award—i.e., failing to establish an exact dollar amount for the award of fees and costs—is at most a defect in the form of the award. Pursuant to Code of Civil Procedure sections 1284 and 1286.6, subdivision (c), the arbitrator retained jurisdiction to correct the form of the award for 30 days after the final award was served on the parties. The date of service was no earlier than April 6, 1992. Accordingly, the May 6, 1992, "supplemental order" was a timely modification of the final order, correcting the form of the attorney fees and costs award.

E. *Did the Trial Court Err in Awarding Prejudgment Interest?*

Finally, appellants contend the trial court erred in awarding prejudgment interest, asserting three separate reasons. We will address each argument briefly.

First, appellants claim the court erred in awarding such interest because it was not demanded in the petition to confirm the award. However, it is well established that, in a contested action, prejudgment interest may be awarded, if the plaintiff is entitled to it, even though the complaint contains no prayer for interest. (*Sears, Roebuck & Co. v. Blade* (1956) 139 Cal.App.2d 580, 294 P.2d 140.) "The rationale of these cases is the simple proposition that in a contested action on a money claim which can be made certain by calculation, the matter of interest for the withholding of the money is 'embraced within the issue' (Code

Civ.Proc., § 508) and the appropriate interest may be allowed even though not prayed for. . . ." (*Id.* at p. 596, 294 P.2d 140.) We can see no reason to distinguish between the award of interest on a complaint and on a petition to confirm an arbitration award.

Appellants' second contention is that respondents' claims were unliquidated—indeed, they were the subject of the "hotly disputed" arbitration, as appellants phrase it—and therefore could not be the subject of an interest award under Civil Code section 3287. That section provides, in part: "Every person who is entitled to recover damages certain . . . and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day [with certain exceptions not relevant here]."

Interest was awarded not upon the unliquidated contract claims, as appellants contend, however, but solely upon the arbitration award from the date of the award. As of the date of the award, respondents were entitled to "recover damages certain" through entry of judgment confirming the award. (9 U.S.C. § 9; see Code Civ.Proc. § 1286, 1287.4.)

Third, appellants argues, as to attorney fees and costs, the award of prejudgment interest thereon "pile[s] 'damages' (interest) on top of other 'damages' (attorneys' fees and costs) which were themselves awarded on Alfa-Laval's modest breach of contract damage claim."

This argument again misconceives the subject of the superior court petition. The petition was not for an award of damages and attorneys fees on the original contracts. That underlying dispute was the subject of the arbitration, and had been concluded by the time of the superior court petition to confirm the award. The arbitration award

itself resulted in a new and fixed liability (see Code Civ. Proc., § 1287.6). Regardless of the individual elements that comprised that liability, respondents were entitled to payment of the fixed sum upon issuance of the award.

The arbitration award was the contractual equivalent of a judgment in respondents' favor. In the context of a judicial judgment, it is clear that interest after judgment accrues as to the entire award, including attorney fees. (See 8 Witkin, Cal. Procedure (3d ed. 1985) Enforcement of Judgments, § 40(d), p. 58.) The prejudgment interest awarded respondents served the same purpose here. Although the interest was pre-"judicial judgment," it was post-"contractual judgment." Any result that denied respondents this post-award interest would punish them for using arbitration instead of the court system to resolve their dispute with appellants.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for a new hearing on appellants' petition to vacate the arbitrator's award and respondents' petition to confirm the award, limited to the single issue, whether there was evident partiality on the part of the arbitrator. If the court finds "evident partiality," then arbitration proceedings shall commence anew. If the court finds to the contrary, the judgment shall be reinstated. Appellants are awarded their costs on appeal.

ARDAIZ, P.J., and HARRIS, J., concur.

[Filed August 10, 1995]

Fifth Appellate District No. F020306
S047194

IN THE SUPREME COURT OF CALIFORNIA

BRITZ INCORPORATED Et Al.,

Appellants

v.

ALFA-LAVAL FOOD & DAIRY COMPANY Et Al.,

Respondents

Respondents' petition for review DENIED.

LUCAS
Chief Justice

Law Offices Of
FRAME & MATSUMOTO
A Professional Corporation
201 Washington Street
Post Office Box 895
Coalinga, California 93210
Attorney For: Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

* * * * *

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC., Plaintiffs,	) CASE NO. 425766-3
vs.	) Date: November 13, 1990) Time: 9:30 a.m.
ALFA-LAVAL FOOD & DAIRY CO., ALFA-LAVAL CREDIT AB, THOMAS W. HINCZ, W. STANLEY PRITCHARD, THOMAS BAILEY, and DOE 1 through DOE 20, inclusive, Defendants.	) Dept: 1) Trial Date: None

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO
PETITION TO COMPEL ARBITRATION

TABLE OF CONTENTS AND TABLE OF AUTHORITIES

[Omitted in printing.]

Law Offices Of
FRAME & MATSUMOTO
A Professional Corporation
201 Washington Street
Post Office Box 895
Coalinga, California 93210
Attorney For: Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

* * * * *

BRITZ, INC., HELM CONCENTRATES, INC., and **HELM TOMATOES, INC.,** Plaintiffs,	) CASE NO. 425766-3
vs.	) Date: November 13, 1990) Time: 9:30 a.m.
ALFA-LAVAL FOOD & DAIRY CO., ALFA-LAVAL CREDIT AB, THOMAS W. HINCZ, W. STANLEY PRITCHARD, THOMAS BAILEY, and **DOE 1 through DOE 20,** inclusive, Defendants.	) Dept: 1) Trial Date: None

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO
PETITION TO COMPEL ARBITRATION

PRELIMINARY STATEMENT

The pending action is an action for rescission of three related contracts, a contract for purchase and sale of aseptic tomato paste and crush equipment, a contract for the purchase of sterile bags, and a contract for the lease of filling machines for use with the paste and crush equipment.

The Complaint seeks rescission of the three contracts. The grounds for rescission are fraud by misrepresentation, fraud by nondisclosure of known facts, and negligent misrepresentation. In California, negligent misrepresentation is a form of actual fraud. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.*, (1989) 216 CA3d 388, at 404).

The Complaint alleges that during the negotiations between the parties, the ALFA-LAVAL defendants falsely represented that the clean-in-place ("CIP") system for the aseptic tomato paste and crush equipment was fully automated, that the aseptic paste equipment could be operated continuously, with at most a shut-down and CIP, including inspection of wear parts, for two to three hours once every ten to twelve days, that fourteen contherms (heat exchangers) would be adequate, that the seals, including the internal O-rings, used for the contherms would have a normal expected lifetime of 2900 hours, and that the system being presented by the ALFA-LAVAL defendants had been used successfully at other locations to produce aseptic tomato paste.

Section 1.4 of the agreement for the purchase of the equipment (Exhibit "A" attached to the Complaint) states as follows: "The system is cleaned by adding concentrates into the balance tank. The centrifugal pump will then circulate the solutions through the system."

Section 1.1 of the same agreement states as follow (emphasis added):

> "The purpose of this project is to produce aseptic tomato paste and crush.
>
> *The most common mode of operation is continuous with stops only for breakdown repairs. The approach taken in this proposal allows for such a mode of operation*, although it is not a recommended plant operation plan. Planned shut-downs with minor maintenance will save the equipment, increase plant utilization and given an overall more economic operation. *The design presented here allows for both modes of operation. We recommend one shut-down and CIP including inspection of wear parts once every ten-twelve days. A shut-down would last two to three hours.*"

All of the representations made by the ALFA-LAVAL defendants were false. (Complaint, paragraph 13, page 6; and Declarations of CLAUDE LUSTER and ROBERT GLASSMAN filed herewith).

The following allegations appear in paragraph 15, pages 6-7, of the Complaint:

> "The foregoing false representations were made with the intent to induce plaintiffs to execute the foregoing contracts (Exhibits "A", "B", and "C"), including but not limited to, the arbitration provisions included in those contracts. The false representations went not only to the contracts as a whole, but to the agreements to arbitrate, as well. Plaintiffs were led to believe by defendants that plaintiffs had to agree to arbitration as a *sine qua non* for acquisition of equipment, bags and filling machines."

The declarations filed herewith by plaintiffs' negotiators, CLAUDE LUSTER and ROBERT GLASSMAN, state that the arbitration provisions were take-it-or-leave-it.

Plaintiffs were being offered a revolutionary new CIP system, a fully automated system, which could save them great sums of money, and they were led to believe that to obtain the system, they had to agree to arbitration. They were led to believe that they had to agree to arbitration to obtain the research and development capability of an international two billion dollar company.

In fact, the CIP system was not fully automated, the aseptic paste equipment could not be operated continuously, with at most a shut-down and CIP, including inspection of wear parts, for two to three hours once every ten to twelve days, and the results were disastrous.

The key-note of defendants' Point and Authorities seems to be that there could not have been fraud in inducing the execution of the contracts or the arbitration clauses because "the contracts involved here were the result of extensive negotiations" and one of plaintiffs' negotiators was an attorney. However, notwithstanding defendants' views, fraud can occur even in sophisticated settings. *Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 CA3d 388, an action by a major airline against a major aircraft manufacturer for misrepresentation by the manufacturer in protracted negotiations for purchase and sale of aircraft, is a recent example.

Defendants also argue that "Now that HELM has used the equipment and bags for its 1990 seasonal tomato crop (Complaint, par. 20), it has decided that it does not want to pay the balances due on the purchase agreements". The argument has to be with tongue-in-cheek. Once the tomato season started and plaintiffs began to use the equipment, plaintiffs were between the proverbial rock and hard place: Plaintiffs could limp along with what they had received from defendants, or plaintiffs could shut-down completely.

GROUNDS OF OPPOSITION

In opposing arbitration, plaintiff's position is two-fold. Plaintiffs claim fraud in the inducement of the contract generally and also claim fraud directed to the arbitration clause.

The Federal Arbitration Act

The Federal Arbitration Act, Title 9, Sections 1-14, United States Code, herein "the Arbitration Act", is applicable to defendants' Petition to Compel Arbitration. The Arbitration Act is applicable to a "written provision in . . . a contract evidencing a transaction involving [interstate] commerce . . . .". (See 9 U.S.C.A. § 2). All of the transactions involved in the case at bar involved interstate commerce. (See Declaration of CLAUDE LUSTER filed herewith, pp. 4-5).

Section 2 of the Arbitration Act, (9 U.S.C.A. § 2) provides that agreements to arbitrate shall be "valid, irrevocable and enforceable, *save upon such grounds as exist in law or in equity for the revocation of any contract*". (Emphasis added). The California arbitration statute has a similar provision. (C.C.P. § 1281.2(b)).

Under the Arbitration Act, the parties are entitled to a jury trial of the issue whether a valid agreement to arbitrate exists. (9 U.S.C.A. § 4). "The issue, 'should not be determined on affidavits, but rather a full trial should be had.' " (*Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, (1977) 67 CA3d 19, 24. Accordingly, in ruling on a petition to compel arbitration, the court should merely determine whether the plaintiff has alleged sufficient facts of fraud directed at the making of the arbitration agreement to warrant a trial on the issue of the validity of the agreement.

In the pending action, plaintiffs clearly allege sufficient facts of fraud directed at the making of the arbitration agreement to warrant a trial on the issue of the validity of the agreement. In that regard, paragraph 15, pages 6-7, of the Complaint alleges as follows:

> " 15. The foregoing false representations were made with the intent to induce plaintiffs to execute the foregoing contracts (Exhibits "A", "B", and "C"), including but not limited to, the arbitration provisions included in those contracts. The false representations went not only to the contracts as a whole, but to the agreements to arbitrate, as well. Plaintiffs were led to believe by defendants that plaintiffs had to agree to arbitration as a *sine qua non* for acquisition of the equipment, bags, and filling machines."

For the reasons set forth above, plaintiffs object to, and plaintiffs move to strike, the affidavit of GOREN OLSSON attached to defendants' Points & Authorities. Plaintiffs submit herewith the declarations of ROBERT GLASSMAN and CLAUDE LUSTER without waiving the foregoing objection, for the limited purpose of placing the declarations before the Court should the Court determine that the consideration of affidavits/declarations is appropriate.

In *Prima Paint v. Flood & Conklin* (1967) 338 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270, a case arising under the Arbitration Act, the United States Supreme Court considered the effect of fraud in an agreement containing an arbitration clause. In *Prima Paint*, the plaintiff had entered into a consulting agreement with the defendant following a sale by plaintiff to defendant of plaintiff's business. The plaintiff, in resisting arbitration, alleged that at the time it entered into the consulting agreement with defendant, defendant fraudulently concealed defendant's insolvency. The Supreme Court held that ar-

bitration clauses are "separable" from the contracts in which they are included, that claims of fraud in the inducement of the contract generally should be resolved by arbitration, *but that claims of fraud directed to the arbitration clause itself should be resolved by the court.* (388 U.S. 402-404).

The California Decisions

The issue addressed by *Prima Paint*, the effect of fraud in the formation of an agreement, containing an arbitration clause, has been addressed by six California Appellate Court decisions. The California decisions are *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc*, (1977) 67 CA3d 19, *supra*, *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 C.3d 312, *Ford v. Shearson Lehman American Express, Inc.* (1986) 180 CA3d 1011, *Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 CA3d 1406, *Green v. Mt. Diablo Hospital District* (1989) 207 CA3d 63, and *Strotz v. Dean Witter Reynolds, Inc.* (1990) 223 CA3d 208.

Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc., (1977) 67 CA3d 19, was an action against a stock brokerage firm by a client for losses and damages due to discretionary sales and purchases of securities under a lending agreement. The trial court denied defendants' petition to compel arbitration pursuant to an arbitration clause in the lending agreement. The Court of Appeal affirmed. The Court of Appeal held that the Arbitration Act is applicable to California's courts in the case of a contract evidencing a transaction involving interstate commerce (67 CA3d 19, 25). The Court of Appeal considered *Prima Paint* and its progeny, and concluded that "where it is alleged that fraud either induced the arbitration clause itself, or permeated the entire agreement including the arbitration

clause, that issue will be determined judicially and not by arbitration." (67 CA3d 19, 27).

In *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 C.3d 312, the California Supreme Court considered an action by a lessee against a lessor arising out of a lease of office premises, in which it was alleged that the leased premises were untenantable by reason of defective air-conditioning. The lessee claimed that it had been fraudulently induced to enter into the lease agreement by representations by the lessor that the premises were in tenantable condition when in fact the air-conditioning was inadequate, making the premises untenantable. The trial court denied the lessor's petition to compel arbitration on the basis of the lessee's claim that it had been fraudulently induced to enter into the lease agreement. The Supreme Court reversed, holding that "claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) will be deemed subject to arbitration." (35 C3d 312, 323). However, in so holding, the Supreme Court notes with approval the Court of Appeal decision in *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*), holding that fraud which "permeated the entire contract including the arbitration provision" vitiates the arbitration agreement and requires judicial determination. (35 C3d 312, 323, fn. 8).

In *Ford v. Shearson Lehman American Express* (1986) 180 CA3d 1011, plaintiff brought action against several parties, including a securities broker and investment advisor, for damages based on an alleged scheme by defendants to defraud him. The trial court denied the broker's motion to compel arbitration of plaintiff's disputes with it pursuant to customer brokerage agreements plaintiff had executed. The Court of Appeal affirmed. The Court

of Appeal held that the Arbitration Act was applicable to the dispute between the parties and concluded that "the threshold issues that whether the agreements were procured by fraud or not voluntarily assented to must be initially determined by a court and not by arbitration." (180 CA3d 1011, at 1024). The Court of Appeal approved and applied the permeation doctrine. It also held that neither *Prima Paint* nor *Ericksen* were applicable, on the grounds that they involved allegations of fraud in the performance of the contract rather in the making of the contract. (180 CA3d 1011, 1023).

In *Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 CA3d 1406, the proceeding involved was a proceeding by a landlord to confirm an arbitration award for a tenant's breach of a commercial real estate lease. The Court of Appeal stated that neither party had "addressed the key issue directly, i.e. whether or not, under our state arbitration statute, a claim specifically charging fraud as to the arbitration clause itself may be referred to arbitration for disposition or must be traditionally determined by litigation in the trial courts." However, the Court of Appeal did not reach or resolve that issue. Instead, it concluded that if the issue already had been determined in the course of arbitration, as it had, the determination would be controlling, and in any event, there was no evidence whatsoever of fraud. (204 CA3d 1406, 1416-1417).

It should be noted that both *Ericksen* and *Feil* are cases involving the California arbitration statute, not the Arbitration Act. *Main* and *Ford* involve the Arbitration Act, as does the pending action.

Green v. Mt. Diablo Hospital District (1989) 207 CA3d 63, is another case involving the state statute. *Green* involved alleged illegality of a termination agreement reached between a hospital district and its chief executive officer.

The agreement included an arbitration clause. The officer sought to compel arbitration under the state statute. The trial court denied the petition to compel arbitration. The Court of Appeal affirmed. In so doing, the Court of Appeal followed *Main* and *Ford*, and stated as follows:

> "Fraud that permeates the entire contract, including the arbitration provision, vitiates the arbitration and requires judicial determination (id., at p. 323, fn. 8, citing *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal. App.3d 19, 27 [136 Cal Rptr. 378]. Although the *Ericksen* court found the permeation doctrine to be inapplicable to the facts of that case, the court in *Ford v. Shearson Lehman American Express, Inc.* (1986) 180 Cal. App.3d 1011 [225 Cal. Rptr. 89t], applied the permeation doctrine to a claim under the federal Arbitration Act. In *Ford, supra*, the court distinguished *Ericksen* by noting that the fraud asserted in *Ericksen* concerned fraud in the performance of the contract and that the fraud alleged was a " 'disappointed expectation' " concerning such performance. (*Ford, supra*, 180 Cal. App. 3d at pp. 1019, 1022.) The fraud alleged did not concern the " 'making' " or procurement of the contract itself. (Id., at p. 1019.) Since Ford alleged that he did not voluntarily assent to the contract, "the fraud . . . goes to the 'making' of the contract, which, if proven, would void the agreements and the arbitration clause contained therein." (Ibid.) Ford sufficiently alleged that he was induced by fraud to make the agreements and that his assent to the agreements was involuntary. The issue of fraud and undue influence must first be determined by a court, not by arbitration. Id., at p. 1023.)"

In *Strotz v. Dean Witter Reynolds, Inc.* (1990) 223 CA3d 208, the trial court denied defendants' petition to compel arbitration, based on allegations in plaintiff's complaint that defendants had fraudulently induced her to sign the contract which contained the agreement to arbitrate, and

that the fraud permeated the entire contract, including the agreement to arbitrate. The Court of Appeals affirmed. The Court of Appeals declined to follow the broad permeation doctrine approved in *Main*, in *Ford*, and in *Green*, but nevertheless, held that fraud directed at the making or performance of the arbitration agreement is to be determined by the court. (223 CA3d 208, at 217). In discussing allegations of fraud directed at the arbitration clause, the Court of Appeals discusses, as illustrations, allegations "that the plaintiffs were led to believe that they had to agree to arbitration or that the arbitration agreement was part of a fraudulent scheme or that the parties never intended to agree to arbitration". (223 CA3d 208).

In *Strotz*, a Petition for Rehearing was filed on September 24, 1990, and was denied. A Petition for Review was filed on October 5, 1990. The California Supreme Court File No. is S017778. Accordingly, *Strotz* is not cited at this time for precedential value, but rather because the Court of Appeal's discussion is enlightening. Also, by the time of the hearing on defendants' motion herein (November 13, 1990), the Petition for Review may be denied, or alternatively, this Court may wish to defer its ruling for a short time to await the outcome of the Petition for Review.

The Pending Case

Plaintiffs' Complaint, as well as the declarations of ROBERT GLASSMAN and CLAUDE LUSTER if the Court determines that the consideration of affidavits/declarations is appropriate, clearly sets forth fraud which permeated the entire contracts, including the arbitration provisions. The fraud was directed "not only to the contracts

as a whole, but to the agreements to arbitrate, as well". (Complaint, paragraph 15, page 6, lines 27-28).

The weight of authority (*Main*, *Ericksen*, *Ford*, and *Green*) compels the conclusion that the permeation doctrine is alive and well in California.

Defendants argue that the permeation doctrine applies only if an agreement, including the agreement to arbitrate, does not result from "arms length negotiations". However, the Arbitration Act allows the courts to give relief where the party opposing arbitration presents "well-supported claims that the agreement to arbitrate resulted from the sort of *fraud or* overwhelming economic power that would provide grounds "for the revocation of any contract." (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, at 627, 105 S.Ct. 3346, at 3354, 87 L. Ed. 2d 444; Emphasis added).

Alternatively, if there is any doubt regarding permeation, the California and federal decisions uniformly held that claims of fraud directed to the arbitration clause itself should be resolved by the court.

CONCLUSION

For the reasons set forth above, the Petition to Compel should be denied.

Dated: October 31, 1990

FRAME & MATSUMOTO

By: /s/ TED R. FRAME,
Attorney for Plaintiffs

Oliver W. Wanger
McCORMIC, BARSTOW, SHEPPARD,
WYATE & CARRUTH
1331 Fulton Mall
Fresno, CA 93721
(209) 442-1150

Attorney For: Defendants/Petitioners

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

* * * * *

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC., Plaintiffs,	CASE NO. 425766-3
vs.	DATE: November 13, 1990 TIME: 9:30 A.M.
ALFA-LAVAL FOOD & DAIRY CO., ALFA-LAVAL CREDIT AB, THOMAS W. HINCZ, W. STANLEY PRITCHARD, THOMAS BAILEY, and DOE 1 through DOE 20, inclusive, Defendants.	DEPT: 1 TRIAL DATE: None

DEFENDANTS/PETITIONERS REPLY TO MEMORANDUM IN OPPOSITION TO PETITION TO COMPEL ARBITRATION

TABLE OF CONTENTS

[Omitted in printing.]

Oliver W. Wanger
McCORMIC, BARSTOW, SHEPPARD,
WYATE & CARRUTH
1331 Fulton Mall
Fresno, CA 93721
(209) 442-1150

Attorney For: Defendants/Petitioners

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

* * * * *

BRITZ, INC., HELM CONCENTRATES, INC., and **HELM TOMATOES, INC.,** Plaintiffs,	) CASE NO. 425766-3
vs.	) DATE: November 13, 1990) TIME: 9:30 A.M.
ALFA-LAVAL FOOD & DAIRY CO., ALFA-LAVAL CREDIT AB, THOMAS W. HINCZ, W. STANLEY PRITCHARD, THOMAS BAILEY, and **DOE 1** through **DOE 20,** inclusive, Defendants.	) DEPT: 1) TRIAL DATE: None

DEFENDANTS/PETITIONERS REPLY TO MEMORANDUM IN OPPOSITION TO PETITION TO COMPEL ARBITRATION

PRELIMINARY STATEMENT

The dispute in this case is rather simple. The plaintiffs claim that the equipment purchased from Alfa-Laval did not perform as warranted. In order to avoid their negotiated agreement to arbitrate this dispute, the plaintiffs have attempted to mislead this court into believing that the issue to be decided is whether there was fraudulent inducement of the contract. This is not true. Plaintiffs' objective is to entice the court into ruling upon all material elements of their breach of express warranty claims by using the guise of a fraud-in-the inducement theory. The only issues to be addressed on the Petition to Compel Arbitration are (1) where should the issue of claimed fraud in connection with arbitration clauses be decided, and (2) if this court elects to resolve this narrow issue, was there fraud in the agreement to arbitrate. Hence, the bulk of the plaintiffs' argument in opposition to arbitration is legally irrelevant. Once this court determines there was no fraudulent inducement of the arbitration agreement, all of the plaintiffs' claims, including fraudulent inducement of the contract, must be decided by arbitration.

The first attempt by the plaintiffs to confuse the court and deflect attention from the true issues to be decided is to mis-cite *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 CA3d 388, for the proposition that fraud can occur in sophisticated settings involving protracted negotiations. (Opposition To Petition To Compel Arbitration, p. 4). *Continental Airlines*, did not involve enforcement of an arbitration agreement. Rather, in *Continental Airlines*, the issue of fraud was decided in the courts because *neither party sought to compel arbitration.* Therefore, *Continental Airlines* is completely irrelevant to this case.

GROUNDS IN SUPPORT

There is No Evidence of Fraudulent Inducement of The Arbitration Agreement

The plaintiffs are compelled to seek to confuse the issue of fraud in the inducement of the *entire* contract with the narrower issue of fraud in securing an agreement to arbitrate disputes. This obfuscation is necessary because any claim of fraud in the inducement of the arbitration agreement is totally unsupported by any facts. The plaintiffs have admitted in sworn affidavits that the matter of arbitration was specifically negotiated over a ten day period in California by the top executives of Britz, one of whom is a licensed lawyer. (Affidavits of Claude Lester and Robert Glassman). The plaintiffs fail to mention in their Memorandum that the negotiation of the arbitration agreement was supervised by their attorney, Ted Frame. In fact, Ted Frame drafted and submitted the arbitration agreement that the plaintiffs now contend was induced by Alfa-Laval's fraud. (Exhibit A hereto, p. 3, par. 3). It defies any sense of logic or common sense to believe that a party can negotiate, draft, and agree to an arbitration agreement and then claim fraudulent inducement of that very same agreement.

The Permeation Doctrine is a Narrow Exception

Because the facts completely belie any contention that there was fraud in the inducement of the arbitration agreement, the plaintiffs' only chance at avoiding their arbitration commitment is the permeation doctrine. The plaintiffs are obviously hoping that the permeation doctrine can be used to present the full merits of their warranty claims to the court and hereby eliminate any necessity for arbitration. However, this is not a permeation case.

The permeation doctrine is a very limited exception to the general rule that fraud in the inducement of a contract must be decided by arbitration. It has never been applied to situations involving arms length negotiations of an arbitration agreement. To the extent that this doctrine exists, it does so only in cases involving breaches of fiduciary duty, or when the parties allege they never really agreed to anything. *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 C.3d 312; *Ford v. Shearson Lehman American Express, Inc.* (1986) 180 CA3d 1011; *Main v. Merrill Lynch, Pierce, Fenner & Smith* (1977) 67 CA3d 19. Neither of these fact patterns exists in this situation.

The foundation of the plaintiffs' permeation doctrine argument is *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). The court in *Prima Paint* held simply that as a matter of federal substantive law, in ruling on a petition to compel arbitration or an application for a stay of court proceeding pending arbitration, the trial court "*may* consider only issues relating to the making and the performance of the agreement to arbitrate" and *may not* "consider claims of fraud in the inducement of the contract generally." 388 U.S. at 404 (emphasis added). *Prima Paint* is not, as the plaintiffs suggest, a Supreme Court mandate for broad application of the permeation doctrine. Rather, court application of the permeation doctrine has been narrowly construed. *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 C.3d 312.

A key case relied on by the plaintiffs is *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 C.3d 312. However, in *Ericksen*, the California Supreme Court found that the permeation doctrine was inapplicable and strongly cautioned against expansion

of the doctrine. 35 C.3d at 323-24. In fact, this case is directly contrary to the plaintiffs' allegation that doubts as to fraud should be resolved by the courts. *Id.* In denying application of the permeation doctrine, the court noted that the difference between a breach of contract and fraudulent inducement "turns upon determination of a party's state of mind at the time the contract was entered into" and a court "ought not close . . . [their] eyes to the practical consequences of a rule which would allow a party to avoid an arbitration commitment by relying upon that distinction." *Id.* In fact, the California Supreme Court stated the permeation doctrine is only applicable when the party seeking to avoid arbitration denies having agreed to *anything*. 35 C.3d at 323, fn. 8.

Further attempts by the plaintiffs to minimize the strong language of the California Supreme Court are of no avail. The plaintiffs point out that *Ericksen* was decided under the California Arbitration Act, not the Federal Arbitration Act. However, the California Supreme Court firmly stated that Code of Civil Procedure section 1281.2 (which calls for arbitration unless there are grounds for revocation of the agreement) and the Federal Arbitration Act (which requires arbitration "save upon such grounds as exist at law or in equity for the revocation of any contract") are essentially expressions of the same rule. 35 C.3d at 323.

Another case cited by the plaintiffs in support of the permeation doctrine is *Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 CA3d 1406. In *Herman Feil*, the court once again warned against expanding the permeation doctrine and refused to apply it. 204 CA3d at 1417. Following *Ericksen*, as this court must, the *Herman Feil* court stated that the permeation doctrine is applicable only where the party seeking to avoid arbitra-

tion denies agreeing to *anything*. *Id.* The court further found that there was nothing persuasive about the asserted fraud and that there was no relationship of confidence or trust that might make the permeation doctrine applicable. 204 CA3d at 1418. Rather, as with the dispute between Alfa-Laval and Britz, the contracts were executed after "arms length negotiation." *Id. Herman Feil* and this dispute involve a "typical commercial dispute for which arbitration was admirably suited, to render by fast and efficient means, a fair determination on the merits." *Id.*

This Case Does Not Fit Into The Narrow Permeation Exception

The plaintiffs cite several California cases in support of their argument that the narrowly construed permeation doctrine should be applied in this case. Essentially, the plaintiffs would like this court to believe that merely because the permeation doctrine has been recognized by some California courts, the doctrine must be applied in this case. However, even the most cursory analysis of cases applying this doctrine demonstrates the fallacy of the plaintiffs' position.

Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 CA3d 19, has been cited by the plaintiffs as support for application of the permeation doctrine. In *Main*, the plaintiff, a conservator of her invalid husband's estate, sought investment advice from Merrill Lynch. 67 CA3d at 31. The plaintiff was "aged and unschooled in business affairs" and relied exclusively on trust and confidence that Merrill Lynch would properly manage her account. *Id.* The defendants breached that trust by asking the plaintiff to sign a loan agreement that allowed Merrill Lynch to margin her account without informing her of the con-

tents. *Id.* The result was an unexpected loss to the plaintiff of over $83,000. 67 CA3d at 24. The loan agreement also contained a "boilerplate" arbitration clause that stated the plaintiff agreed to submit all claims to arbitration. 67 CA3d at 30.

In applying the narrow permeation doctrine, the *Main* court found that the plaintiff did not realize she signed an arbitration agreement and there never was any real agreement to submit the dispute to arbitration. *Id.* The *Main* court also held that grounds existed for revocation of the arbitration agreement because the defendants breached their fiduciary duty to disclose the material nature of the documents. 67 CA3d at 31-32. Hence, the question of fraud was to be decided in a court. 67 CA3d at 32.

The facts of the present dispute are in no way analogous to those in *Main*. First, both Alfa-Laval and Britz are sophisticated in business affairs. Second, no fiduciary relationship exists. Third, the arbitration agreement was not "boilerplate." Lastly, given the fact the agreements were negotiated, there can be no realistic argument that the plaintiffs did not know what they were signing. Therefore, *Main* cannot support the plaintiffs' position.

Another case relied on by the plaintiffs in which the permeation doctrine was applied is *Ford v. Shearson Lehman American Express*, (1986) 180 CA3d 1011. In *Ford*, the plaintiff had the majority of his $25 million in assets misappropriated from his account at Shearson. *Id.* This misappropriation was allegedly accomplished when Shearson breached its fiduciary duty to the plaintiff by allowing other persons to collect the proceeds from stock owned by the plaintiff. 180 CA3d at 1017. In denying the broker's motion to compel arbitration, the court relied on two facts. First, the broker breached his fiduciary duty by a "scheme

of domination, control, concealment, misrepresentation and advantage gained by virtue to the fiduciary position" of the broker. 180 CA3d at 1028. Second, the court held that the plaintiff was not aware that he signed an arbitration agreement. *Id.*

As with *Main*, *Ford* is completely inapposite to the present dispute. There is no fiduciary relationship between Alfa-Laval and Britz. Further, there is no claim that the plaintiffs did not know they were signing an arbitration agreement.

Still another case relied on by the plaintiffs is *Green v. Mt. Diablo Hosp. Dist.*, (1989) 207 CA3d 63. In *Green*, taxpayers sought declaratory relief that an employment contract was void and unconstitutional. 207 CA3d at 69. The *Green* court denied the petition to compel arbitration not because fraud permeated the contract, but because there were "sufficient grounds alleging illegality of the underlying agreement." 207 CA3d at 67. These allegations implied that the entire agreement was "illegal from its inception and against public policy." *Id.* In contrast, there is no claim that the agreement between Alfa-Laval and Britz is illegal. Therefore, *Green* provides no support for the contention that the permeation doctrine should be applied in the instant case.

Lastly, the most current case cited by the plaintiffs, *Stortz v. Dean Witter Reynolds, Inc.*, (1990) 223 CA3d 208, 272 Cal. Rptr. 680, refused to utilize even the *limited* permeation doctrine applied in *Main* and *Ford*. In *Stortz*, the defendants allegedly lost $180,000 of the plaintiff's funds by investing in high risk index options. 272 Cal. Rptr. at 682, fn. 1. Dean Witter also allegedly stated that the investments were low risk and concealed the full extent of the plaintiffs losses. 272 Cal. Rptr. at 682. The *Stortz*

court refused to compel arbitration for the simple reason that the plaintiff did not realize she had signed contracts. 272 Cal. Rptr. at 686-87. If a party is unaware they are signing contracts, they are unaware they are agreeing to arbitration by signing a contract. 272 Cal. Rptr. at 687. Given that the *Stortz* court did not apply the permeation doctrine and that the plaintiffs in the instant litigation clearly knew they were signing contracts, *Stortz* provides no support whatsoever for applying the permeation doctrine in the present dispute.

Common sense and the case law overwhelmingly dictate the permeation doctrine not be applied here. If the plaintiffs' argument was correct, parties could merely cry "fraud" and totally avoid every agreement to arbitrate. This would be contrary to the longstanding Federal and California policy favoring arbitration and of resolving all doubts in favor of arbitration. *E.g., O'Malley v. Wilshire Oil Co.*, (1963) 59 C.2d 482, 490-91; *Freeman v. State Farm Mutual Auto Ins. Co.*, (1975) 14 CA3d 473, 483; *Loscalzo v. Federal Mutual Ins. Co.*, (1964) 228 CA2d 391, 398.

The California Procedural Rules Apply

The plaintiffs also erroneously construe the relationship between the Federal Arbitration Act (9 U.S.C.A. § 2) and the California Arbitration Act (C.C.P. §§ 1280-1294.2). The plaintiffs are correct in stating that the Federal Arbitration Act is applicable to written provisions in a contract evidencing interstate commerce. (9 U.S.C.A. § 2). They are also correct in stating that this dispute involves interstate commerce. However, when an arbitration action is brought in state court, the Federal Arbitration Act applies only as to matters of substantive law. *Main v. Merrill Lynch,*

Pierce, Fenner & Smith, Inc., (1977) 67 CA3d 19, 24-25. *See also Green v. Mt. Diablo Hosp. Dist.*, (1989) 207 CA3d 63; *Ford v. Shearson Lehman/American Express, Inc.*, (1986) 180 CA3d 1011.

California state courts cannot apply federal procedural law. Under California civil procedure, whether an arbitration agreement is valid is to be decided in a summary fashion "in the manner and upon the notice provided for the making and hearing of motions, . . ." (C.C.P. § 1290.2). Further, the court in *Herman Feil*, determined that fraud in the inducement of an arbitration agreement may be decided by an arbitrator. 204 CA3d at 1416-17.

Lastly, despite the plaintiffs' contention to the contrary, the *Main* decision does not stand for the general notion that under *federal* procedural rules a judge should merely determine whether the plaintiff has alleged sufficient facts of fraud directed at the making of the arbitration agreement to warrant a trial on the issue of the validity of the agreement. In *Main*, the defendants alleged only that an arbitration agreement was entered into, that they were ready and willing to submit the controversy to arbitration and that the plaintiff refused to do so. 67 CA3d at 29. Unlike this case, the *Main* plaintiff did not file a response, but rather stood on the complaint. *Id.* Therefore, only a question of law was presented. It was only natural that the sole issue for the court was whether the plaintiff pleaded sufficient facts to support their charge. *Id.* Thus, the plaintiffs' contention that federal procedural rules merely require a cursory pleading effort is misstated as well as misdirected.

The Pending Case

The court has discretion in the present matter to decide whether the arbitration agreements were fraudulently induced. The plaintiffs have failed to present any evidence that would support fraudulent inducement of their arbitration agreements. In fact, the evidence presented by the plaintiffs strongly suggests that both parties agreed "with their eyes wide open" to arbitrate disputes arising under the contracts. The plaintiffs knew exactly what they were doing. Tough negotiations with each side giving a little and getting a little took place here. The plaintiffs agreed to arbitrate all disputes and had their own attorney draft the language they now wish to avoid. There was no fraud in reaching the agreement to arbitrate.

Finally, the plaintiffs cannot bootstrap the permeation doctrine into this case as a means of securing a judicial finding on their warranty claims. This doctrine has been narrowly applied only to disputes where the parties did not agree to arbitrate or cases of breach of fiduciary duty. Neither situation is present in this case. The permeation doctrine cannot be applied here. Because the plaintiffs have failed to show any fraud in connection with their agreement to arbitrate, this case must be dismissed or stayed so that the already pending arbitrations may go forward.

CONCLUSION

For the reasons set forth above, the PETITION TO COMPEL ARBITRATION should be granted, the MOTION TO STAY PROCEEDINGS should be granted and the DEFENDANTS/PETITIONERS should be awarded costs and fees incurred by reason of this proceeding.

Dated: November 9, 1990

McCORMIC, BARSTOW, SHEPPARD,
WYATE & CARRUTH

By: /s/ OLIVER W. WANGER,
Attorney for
Defendants/Petitioners

August 4, 1992

72 T199 2101 90 RM
Alfa-Laval Food And Dairy Co.,
A Div. Of Alfa-Laval, Inc.
—and—
Helm Concentrates, Inc., Britz,
Inc., & Helm Tomatoes, Inc.

AAA Rules: Commercial

Craig White Michael Dockterman
& Daniel Kaplan Attorneys
for Alfa-Laval Food & Dairy Co
Wildman Harrold Allen & Dixon
225 West Wacker Dr. #3000
Chicago, IL 60606

Ted R Frame Attorney
for Helm Concentrates etc.
Frame & Matsumoto
PO Box 895
Coalinga, CA 93210

Dear Parties:

The Association has received and reviewed the parties various correspondence concerning the disclosure issue of the Arbitrator raised by Attorney Frame. We have also received the latest correspondence of Attorney White dated July 31, 1992.

Upon careful review by the Association and in accordance with Section 19 of the Commercial Arbitration Rules, it is the determination of the Administrator that the challenge submitted by Respondent to the Arbitrator's continued service be denied and Arbitrator John E. Peterson's appointment and continued service on the above-captioned matter is reaffirmed.

Sincerely,

/s/ Rocco M. Scanza
Assistant Regional Director
RMS/ct

Encl.

cc: John E. Peterson, Esq.

February 18, 1993

72 T199 2101 90
Alfa-Laval Food And Dairy Co.,
A Div. Of Alfa-Laval, Inc.
—and—
Helm Concentrates, Inc., Britz,
Inc., & Helm Tomatoes, Inc.

AAA Rules: Commercial

VIA FAX

Craig White Michael Dockterman
& Daniel Kaplan Attorneys
for Alfa-Laval Food & Dairy Co.
Wildman, Harrold, Allen & Dixon
225 West Wacker Dr. #3000
Chicago, IL 60606

Ted R. Frame Attorney
for Helm Concentrates etc.
Frame & Matsumoto
PO Box 895
Coalinga, CA 93210

Andrew W. Vorzimer,
Raphael Cotkin and
Joan M Dolinsky Attorneys
for Helm Concentrates etc.
Cotkin & Collins
201 N Figueroa St. S-1100
Los Angeles, CA 90012

Dear Parties:

The Association, after carefully considering the parties' contentions, hereby reaffirms the appointment of John E. Peterson as the Arbitrator in the above captioned matter.

Additionally we received a telecopied letter dated February 18, 1993, from Attorney Vorzimer, advising that Respondents Helm Concentrates, Inc., Britz, Inc. and Helm

Tomatoes) Inc. will file an action in Superior Court seeking a temporary restraining order against the American Arbitration Association in this proceeding.

We believe it is neither necessary nor proper to include the Association nor the Arbitration Panel as parties to any legal proceedings between the parties in connection with this arbitration. Section 47 of the Rules states that "Neither the AAA nor any Arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration."

Were the AAA to become involved in judicial proceedings between the parties, it would detract from its function as an impartial administrator. Thus, the AAA does not generally appear or participate in litigation relating to an arbitration. Therefore, the Association will not answer or appear at the Court Hearing.

The Association will, however, abide by any Order issued by the Court.

Very truly yours,

/s/ Rocco M. Scanza
Regional Vice President
RMS/ves

[Filed July 20, 1993]

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

* * * * *

BRITZ, INC., HELM CONCENTRATES, INC., and **HELM TOMATOES, INC.,** Plaintiffs, v. **ALFA-LAVAL FOOD & DAIRY CO., ALFA-LAVAL CREDIT AB, THOMAS W. HINCZ, W. STANLEY PRITCHARD, THOMAS BAILEY,** and **DOE 1** through **DOE 20,** inclusive, Defendants.	CASE NO. 425766-3

ORDER CONFIRMING ARBITRATION AWARD

THIS MATTER COMES ON to be heard before the Court, the Honorable Robert Z. Mardikian, presiding, on June 14, 1993 and June 15, 1993, upon plaintiffs', Britz, Inc., Helm Concentrates, Inc., and Helm Tomatoes, Inc. (hereinafter collectively "Britz/Helm"), Petition to Vacate the Award of Arbitrator ("Admissions Motion"), Evidentiary Objections to Defendants' Declarations ("Objections"), and Responses to Petition to Confirm Final Arbitration Award ("Response"). In addition, defendants, Alfa-Laval

Food & Dairy Co. and Alfa-Laval Credit AB (hereinafter collectively "Alfa-Laval"), presented for hearing their Petition to Confirm Final Arbitration Award (as supplemented by amendment filed May 26, 1993) ("Petition to Confirm"), Motion to Dismiss Petition to Vacate ("Motion To Dismiss"), and Motion to Set a Date Certain for Evidentiary Hearing ("Motion for Evidentiary Hearing"). Frame & Matsumoto, by Ted R. Frame and Russell Matsumoto, appeared for Britz/Helm, and Wildman, Harrold, Allen & Dixon, by Craig M. White and Thomas J. Verticchio, appeared for Alfa-Laval.

The Court has reviewed all of the briefs, exhibits, and authorities submitted by the parties in support of and in opposition to the various motions on file. The Court takes judicial notice of all materials filed with the Court in this matter. In addition, the Court heard the oral arguments of counsel for the parties on June 14, 1993 and June 15, 1993.

Having heard the arguments of counsel and considered the various memoranda and exhibits filed by the parties and being fully advised in the premises, the Court issued its verbal findings and orders on June 15, 1993. The transcript setting forth the Court's oral findings and rulings in detail is incorporated herein and made a part hereof and attached as Exhibit A.

THE COURT, FOR THE REASONS STATED IN ITS VERBAL FINDINGS AND ORDERS, HEREBY FINDS AND ORDERS THAT:

(1) Alfa-Laval's Motion to Dismiss is granted, and the Petition to Vacate is dismissed with prejudice.

(2) The Admissions Motion, the Objections, and the Motion for Evidentiary Hearing are mooted.

(3) Alfa-Laval's Petition to confirm is granted, and the defenses asserted in Britz/Helm's Responses are overruled and dismissed.

(4) Pursuant to § 1287.4 of the California Code of Civil Procedure, Alfa-Laval is entitled to a final judgment in its favor and against Britz, Inc. and Helm Concentrates, Inc. in the total amount of $2,697,126.20. In addition, Alfa-Laval is entitled to accrued interest in the amount of $35,351.31 (through June 15, 1993). Interest shall accrue from the date of judgment at the statutory rate until the judgment has been satisfied. Further, Alfa-Laval is entitled to an award of costs incurred in these proceedings.

(5) Having entered final judgment in the cause, the Court dismisses with prejudice all remaining defendants.

(6) Enforcement proceedings on the judgment in favor of Alfa-Laval are stayed for a period of 30 days from the date of this Order.

DATED: July 16, 1993

ENTER:

_____

Honorable Robert Z. Mardikian

[Filed July 20, 1993]

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

* * * * *

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC., Plaintiffs, v. **ALFA-LAVAL FOOD & DAIRY CO., ALFA-LAVAL CREDIT AB, THOMAS W. HINCZ, W. STANLEY PRITCHARD, THOMAS BAILEY, and DOE 1 through DOE 20,** inclusive, Defendants.	) CASE NO. 425766-3

JUDGMENT

Pursuant to the Court's Order Confirming Arbitration Award entered this date, the Court hereby orders that judgment in the principal amount of $2,697,126.20 plus interest in the sum of $35,351.31, for a Total Judgment of $2,732,477.51, plus costs in the amount of $_____, be and is hereby entered in favor of defendants, Alfa-Laval Food & Dairy Co. and Alfa-Laval Credit AB and against plaintiffs, Britz, Inc. and Helm Concentrates, Inc. Interest at the statutory rate shall accrue on the Total Judgment from date of judgment until satisfied.

DATED: July 16, 1993

ENTER:

Honorable Robert Z. Mardikian

[Filed June 6, 1995]

CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BRITZ, INC. et al.,	)	
	)	F020306
Plaintiffs and Appellants,	)	
v.	)	(Super. Ct.
	)	No.
ALFA-LAVAL FOOD & DAIRY CO. et al.,	)	425766-3)
	)	
Defendants and Respondents.	)	
	)	

MODIFICATION OF OPINION
UPON DENIAL OF PETITION FOR REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

Respondents petitioned for rehearing on May 23, 1995, and appellants filed an answer to the petition for rehearing. Upon consideration of the petition and the answer, the petition for rehearing is hereby denied. However, the opinion filed May 8, 1995, is ordered modified in the following respects:

The second sentence of the second full paragraph on page 13 of the typewritten opinion is deleted and the following sentence is substituted therefor:

> Substantial evidence supports the trial court's finding that one of appellants had timely knowledge that Peterson's firm received business referrals from McCormick.

The second full sentence on page 29 of the typewritten opinion is deleted and the following sentence is substituted therefor:

> Pursuant to Code of Civil Procedure section 1284 (incorporating Code Civ. Proc., § 1286.6, subd. (c)), the arbitrator retained jurisdiction to correct the form of the award for 30 days after the final award was served on the parties.

The paragraph entitled "DISPOSITION" on page 32 of the typewritten opinion is deleted and the following paragraph is substituted therefor:

> The judgment is reversed and the matter is remanded to the trial court. The trial court shall conduct an evidentiary hearing on appellants' petition to vacate the arbitrator's award and respondents' petition to confirm the award. The issues at such evidentiary hearing shall be limited to the following: (1) whether the nature of the relationship between the McCormick firm and respondents, as known to the arbitrator prior to the issuance of the arbitrator's interim award, gives rise to evident partiality of the arbitrator based upon failure of the arbitrator to disclose to appellants his expert witness relationship with the McCormick firm; and (2) if so, whether the consequences of that failure to disclose are overcome by evidence presented on remand that the pertinent facts of evident partiality[11] were actually and timely revealed to or otherwise became known by appellants such that appellants have waived any right to

---

[11] That is, the nature and extent of the relationship between the arbitrator and the McCormick firm.

complain about the arbitrator's failure to disclose.[12] If the court finds "evident partiality" and that such has not been overcome by evidence of waiver, then arbitration proceedings shall commence anew. If the court finds to the contrary, the judgment shall be reinstated. Appellants are awarded their costs on appeal.

This modification does not effect a change in the judgment.

/s/ Vartabedian
Vartabedian, J.

WE CONCUR:

/s/ Ardaiz
Ardaiz, P. J.

/s/ Harris
Harris, J.

---

[12] As respondents correctly raise in their petition for rehearing, their efforts to present waiver evidence in the earlier superior court proceedings became moot when that court dismissed appellants' petition to vacate. We thus find it appropriate to allow, on remand, presentation of evidence of appellants' knowledge, limited to what appellants and their counsel knew during the narrow timeframe from December 2, 1991, when the McCormick firm appeared in the arbitration at a time when Peterson was currently engaged as an expert witness by McCormick, and issuance of the interim award on May 22, 1992, the timeframe during which, on the facts presented, appellants' failure to act on such knowledge may be the basis for finding waiver.

Supreme Court, U.S.
FILED
DEC 5 1995
CLERK

(3)

No. 95-725

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO.,
AND ALFA-LAVAL CREDIT AB,
Petitioners,
v.
BRITZ, INC., HELM CONCENTRATES, INC.
AND HELM TOMATOES, INC.,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of California

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS E. CAMPAGNE
(Counsel of Record)
CLIFFORD C. KEMPER
THE LAW FIRM OF
THOMAS E. CAMPAGNE &
ASSOCIATES
1685 North Helm Avenue
Fresno, California 93727
(209) 255-1637
Attorneys for Respondents

36 pp

QUESTIONS PRESENTED

1. Is the petition to this Court premature where this case is presently being litigated in the state trial court and subject to review by the State Appellate Court and the California Supreme Court?

2. Should this Court review a State Appellate Court decision—when no final disposition exists because the matter is on remand to the trial court for an evidentiary hearing on arbitrator bias and to confirm or vacate the arbitration award—where Petitioners do not assert that the case falls within any of the four categories of cases considered final for purposes of 28 U.S.C. section 1257 despite pending trial court proceedings?

3. Did the State Appellate Court correctly decline to read AAA Commercial Arbitration Rule 19 to abrogate judicial review of arbitrator bias and hold that a trial court considering a petition to confirm or vacate an arbitration award is required to determine, *de novo,* whether the circumstances disclose a reasonable impression of arbitrator bias?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
LAW AND ARGUMENT.....	7
A. THE PETITION IS PREMATURE AS NO FINAL DISPOSITION EXISTS BECAUSE THE MATTER IS ON REMAND TO THE STATE SUPERIOR COURT FOR AN EVIDENTIARY HEARING AND PETITIONERS FAIL TO SHOW THIS MATTER FALLS WITHIN ANY OF THE FOUR CATEGORIES OF CASES WHERE A STATE COURT DETERMINATION IS FINAL FOR PURPOSES OF 28 U.S.C. SECTION 1257 DESPITE PENDING STATE TRIAL COURT PROCEEDINGS	7
B. THE STATE APPELLATE COURT CORRECTLY DECLINED TO ALLOW AAA COMMERCIAL ARBITRATION RULE 19 TO ABROGATE JUDICIAL REVIEW OF ARBITRATOR PARTIALITY BECAUSE STATUTORY AND DECISIONAL LAW RESERVES THE FINAL DECISION ON ARBITRATOR BIAS FOR THE COURTS UPON A PETITION TO VACATE OR CONFIRM AN ARBITRATION AWARD	9
CONCLUSION.....	18

INDEX TO APPENDIX
(Separate Volume)

	APP. PAGE
Letter from Arbitrator John E. Peterson to Messrs. Savrnoch, Strauss, Verticchio and Frame, dated December 6, 1991, granting the issuance of deposition subpoenas requested by Alfa-Laval's co-counsel McCormick, Barstow	A-1
Letter from John T. Savrnoch of McCormick, Barstow to Arbitrator John E. Peterson, dated December 2, 1991, requesting the issuance of deposition subpoenas on behalf of Alfa-Laval	A-3
Interim award of Arbitrator John E. Peterson in favor of Alfa-Laval, dated May 22, 1992	A-8
Order re motion for reconsideration of interim award of Arbitrator John E. Peterson, dated September 24, 1992	A-25
Declaration of Robert Glassman in support of petition to vacate arbitrator's award on the basis of arbitrator bias, dated December 8, 1992	A-34
Letter from Arbitrator John E. Peterson to Mr. Ted Frame, dated June 25, 1992, denying any special relationship between arbitrator and his law firm to the McCormick, Barstow law firm	A-38
Letter from Arbitrator John E. Peterson to Mr. Ronald McNair of the AAA, dated July 9, 1992, acknowledging referrals from the McCormick, Barstow firm to the arbitrator and/or his law firm while functioning as the arbitrator	A-41
Letter from Arbitrator John E. Peterson to Mr. Ron McNair of the AAA, dated July 15, 1992, acknowledging that he was employed as an expert on two separate matters by McCormick, Barstow, co-counsel for Alfa-Laval, while functioning as the arbitrator	A-46
Supplemental declaration of Mr. Ted R. Frame in support of petition to vacate arbitrator's award, dated April 19, 1993	A-53

INDEX TO APPENDIX
(Separate Volume)

	APP. PAGE
Letter from Ted R. Frame to Mr. Ron McNair, dated July 21, 1992, requesting that the arbitrator be replaced	A-59
Letter from Rocco M. Scanza of the AAA to Messrs. White, Dockterman, Kaplan and Frame, dated August 4, 1992, denying Helm's request to disqualify the arbitrator	A-68
Letter from Joan M. Dolinsky to Mr. Rocco M. Scanza of the AAA, dated February 4, 1993, requesting reconsideration of AAA's denial of Helm's request to disqualify the arbitrator	A-70
Letter from Rocco M. Scanza of the AAA to Messrs. White, Dockterman, Kaplan, Frame, Vorzimer, Cotkin and Dolinsky, dated February 18, 1993, rejecting Helm's request for reconsideration	A-79
Final award of Arbitrator John E. Peterson, dated March 31, 1993	A-81
Supplemental award of attorneys' fees and costs by Arbitrator John E. Peterson, dated May 6, 1993 and filed on May 10, 1993	A-84

TABLE OF AUTHORITIES

Cases

	Page
American Railway Express Company v. Levee, 263 U.S. 19 (1923)	7
Commonwealth Coatings Corp. v. Confidential Casualty Co., 393 U.S. 145 (1968)	6, 13, 15
Cox Broadcasting Corp. v. Cohn, 429 U.S. 469 (1975)	7, 8
First Options of Chicago Inc. v. Kaplan, ____U.S.____, 115 S.Ct. 1920	16, 17
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	11
Richard Gebers v. State Farm General Insurance Company, 38 Cal.App.4th 1648, 45 Cal.Rptr.2d 725 (1995)	13
Health Services Management Corp v. Hughes, 975 F.2d 1253 (7th Cir. 1992)	14, 15, 18
Merit Insurance Co. v. Leatherby Insurance Co., 714 F.2d 673 (7th Cir. 1983)	12, 13
Michigan-Wisconsin Pipe Line Co. v. Calvert, Comptroller of Public Accounts, et al., 347 U.S. 157 (1954)	7
Nida Engalla, et al. v. Permanente Medical Group, Inc., et al., 37 Cal.App.4th 497, 520-521, 43 Cal.Rptr.2d 621 (1995)	10
Perry v. Thomas, 482 U.S. 483 (1987)	7
Rogers v. Schering Corporation, 165 F.Supp. 295 (D.C.N.J. 1958), *aff'd*, 271 F.2d 266 (3rd Cir. 1959)	14, 15
San Carlo Opera Co. v. Conley, 72 F.Supp. 825 (S.D.N.Y 1946) *aff'd*, 163 F.2d 310 (2nd Cir. 1947).	14, 15
Smith v. Prudential Securities, 846 F.Supp. 978 (M.D. Fla. 1994)	15
Southland Corp. v. Keating, 465 U.S. 1 (1984)	10

TABLE OF AUTHORITIES

CASES

Page

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 9, 10, 11

York Hannover Holding A.G. v. American Arbitration Association et al., 92 Civ. 1643, 1993 WL 159961, 1993 U.S. Dist. LEXIS 6192 (S.D.N.Y. May 11, 1993) 16

Statutes

9 U.S.C. §1 *et seq.* 9

9 U.S.C. §3 ..... 10, 11

9 U.S.C. §4 ..... 9, 10, 11

28 U.S.C. §1257 7

28 U.S.C. §1257(a) 7

28 U.S.C. §1257(2) 7

California Code of Civil Procedure

§1281.2 10

§1286.2 ..... 5, 14

Miscellaneous

AAA Commercial Arbitration Rule 19 ..... 9, 11, 12, 13, 16, 17

No. 95-725

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO.,
AND ALFA-LAVAL CREDIT AB,
Petitioners,
v.
BRITZ, INC., HELM CONCENTRATES, INC.
AND HELM TOMATOES, INC.,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of California

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In late 1989 Respondents Britz, Inc., Helm Concentrates, Inc. and Helm Tomatoes, Inc. ("Helm") prepared to build a tomato processing plant. After consulting with manufacturers and engineers, Helm obtained machinery, equipment, and consulting services from Petitioners Alfa-Laval Food & Dairy Co. and Alfa-Laval Credit AB ("Alfa-Laval")—a large Swedish engineering and manufacturing concern. Helm selected Alfa-Laval primarily because of Alfa-Laval's warranties and representations on the capabilities and reliability of its paste sterilization equipment.

The Alfa-Laval equipment failed to perform as represented. The failure of Alfa-Laval's equipment cost Helm its business. Helm's losses, including lost profits and expenses incurred in attempting to make the equipment perform as warranted, exceeded $5 million dollars. Helm lost an additional $10 million dollars when forced to sell the tomato processing plant.

In September 1990, Helm sued Alfa-Laval for rescission of the parties' agreement and damages. Alfa-Laval successfully petitioned the Fresno County Superior Court to compel arbitration of the dispute. The parties' agreement provided for submission of controversies and claims to arbitration. See, Petition for Cert. p. 3. The parties' agreement also contained a choice of law provision:

> "Section 15. . . is modified as follows: (1) the governing law shall be the law of the state of California, (2) arbitration shall be in Fresno, and (3) the prevailing party in the arbitration shall be entitled to reasonable attorneys' fees."

Following the Superior Court's granting of Alfa-Laval's petition to compel arbitration, the American Arbitration Association ("AAA") appointed John Peterson, a partner in the Fresno, California law firm of Jory, Peterson &

Sagaser, as arbitrator. Helm accepted Peterson as the arbitrator—neither Helm nor its counsel possessed any facts that caused them to believe Peterson might be biased in favor of Alfa-Laval.

Arbitration on the issue of liability commenced in January 1992. The Chicago law firm of Wildman, Harrold, Allen & Dixon ("Wildman, Harrold") and attorney Craig White ("White") acted as Alfa-Laval's primary counsel before the arbitrator. The Fresno firm of McCormick, Barstow, Sheppard, Wayte & Carruth ("McCormick, Barstow"), Alfa-Laval's primary superior court counsel, actively worked with the Wildman, Harrold firm on various aspects of the arbitration, and even requested and obtained affirmative relief for Alfa-Laval from the arbitrator. Appendix to Opposition to Petition for Certiorari pp. A-1 through A-7.

The arbitrator issued his interim award in May 1992. Arbitrator Peterson concluded that Alfa-Laval's performance representations concerning its machinery and equipment were not representations of material fact and that, in any event, "the. . . shut-down and run times language is not essential to the purpose of the Alfa-Helm Agreement." App. to Opp. to Petition for Cert. pp. A-15, A-27. The arbitrator also decided that each side would bear its own fees and costs. App. to Opp. to Petition for Cert. p. A-23.

On June 22, 1992, Robert Glassman of Helm, spoke on the telephone with Marshall Whitney, a senior member of McCormick, Barstow. App. to Opp. to Petition for Cert. p. A-36. After Mr. Glassman told attorney Whitney that arbitrator Peterson issued an interim arbitration award against Helm, Whitney said "He had personally made two or three referrals to John Peterson recently, within that last year or two. . . ." App. to Opp. to Petition for Cert. p. A-36. Glassman told Helm's trial and arbitration attorney, Ted Frame, about Whitney's remark. Two days later Frame sent the first of several written requests for disclosure of cases or

other legal matters referred to arbitrator Peterson's law firm by any of the attorneys in the McCormick, Barstow firm or visa-versa within 3 years of Peterson's appointment as arbitrator. Peterson's responses to inquiries from Frame began to trickle in on June 25, 1992.

Initially, Peterson revealed no conflict of interest facts and declared "there is no special relationship between me or our firm and the McCormick, Barstow firm." App. to Opp. to Petition for Cert. p. A-38. Peterson acknowledged only that his firm was on McCormick, Barstow's list of referral firms.

Peterson offered no further response until July 9, 1992, and then only following a flurry of letter exchanges between White, Frame, and the AAA. At that time, in light of Frame's demands, Peterson wrote "In the past, when I have arbitrated a matter involving a party represented by the McCormick, Barstow firm, I have advised the American Arbitration Association that I have been on McCormick, Barstow's referral list. I would have done so in this case had I believed that McCormick, Barstow represented Alfa-Laval in the arbitration, or in any other capacity." App. to Opp. to Petition for Cert. p. A-41. Yet, Peterson acknowledged he knew McCormick, Barstow represented Alfa-Laval "in [another] capacity." "I knew in April 1991, that McCormick, Barstow represented Alfa-Laval in the superior court action." App. to Opp. to Petition for Cert. pp. A-41 through A-42.

Following another flurry of letters between White, Frame and the AAA, on July 15, 1992 Peterson finally revealed the extent of his business relationship with McCormick, Barstow. Peterson admitted that McCormick, Barstow referred six new legal matters to him personally or to his firm—within 18 months of his appointment as the arbitrator in this case. App. to Opp. to Petition for Cert. pp. A-46 through A-52. Later, it was shown that McCormick, Barstow referred a seventh matter to Peterson or to his firm

within the same period. App. to Opp. to Petition for Cert. p. A-55. Most importantly, midway through his six page letter, Peterson revealed the existence of the ongoing pecuniary business relationship he had with McCormick, Barstow as an expert witness while arbitrating the instant matter:

"C. I was consulted and agreed to serve as an expert witness in these matters in which McCormick, Barstow represented attorney firms as legal malpractice defendants:

(1) *Forte v. Lang, Richert & Patch*
I was initially contacted in late 1984 or early 1985. I provided deposition testimony and trial testimony on behalf of defendants. The case resolved favorably to defendants in September 1985.

(2) *Bilyeu v. Baker, Manock & Jensen*
Larry Wayte of the McCormick, Barstow firm contacted me in about November 1991. I have reviewed the pertinent transcripts and documents in the case, and provided an oral opinion to Mr. Wayte. If this matter goes to trial, I expect to testify.

(3) *Fansler v. Motschiedler, Michaelides & Wishon*
Marshall Whitney of the McCormick, Barstow firm contacted me in December 1991 regarding testimony in this case. I have reviewed appropriate documents and transcripts, provided an oral opinion, and given deposition testimony. If this case goes to trial, I expect to testify."

App. to Opp. to Petition for Cert. pp. A-49 and A-50.

Peterson admitted that just weeks before the arbitration began, McCormick, Barstow hired him twice (in November 1991 and December 1991) as an expert witness for McCormick, Barstow in other matters. Put plainly, Peterson was on McCormick, Barstow's payroll while he arbitrated the Alfa-Laval/Helm dispute and while McCormick, Bar-

stow actively represented Alfa-Laval in the litigation and the arbitration.

Armed with these admissions, Helm asked the AAA to remove Peterson and appoint a new arbitrator. App. to Opp. to Petition for Cert. pp. A-59 through A-67. The AAA wrote the parties on August 4, 1992, affirming the continued service of Peterson as arbitrator. App. to Opp. to Petition for Cert. pp. A-68 and A-69.

Helm sought reconsideration from the AAA on February 4, 1993. App. to Opp. to Petition for Cert. pp. A-70 through A-78. On February 18, 1993 the AAA reaffirmed Peterson's continuing service as arbitrator. App. to Opp. to Petition for Cert. pp. A-79 and A-80. Helm unsuccessfully petitioned the Fresno County Superior Court to vacate the interim award, and the California Fifth Appellate District Court of Appeal ("Appellate Court") denied Helm's petition for extraordinary relief without comment.

The damages phase of the arbitration began in February 1993. Peterson issued his opinion and final award on March 31, 1993. Peterson awarded Alfa-Laval $587,425.00—as payment for the tomato processing equipment that by then had been scrapped—and Helm nothing. App. to Opp. to Petition for Cert. pp. A-81 through A-83. Peterson also reversed the decision he made in his interim award (that each side was to bear its own fees and costs), and awarded fees and costs to Alfa-Laval by supplemental award for a total award of $2,109,701.10. App. to Opp. to Petition for Cert. pp. A-84 through A-88.

Helm petitioned the Fresno County Superior Court, pursuant to California Code of Civil Procedure section 1286.2, to vacate the final arbitration award as supplemented by the fee and cost award of May 10, 1993, based on arbitrator bias. Alfa-Laval filed cross-motions to dismiss Helm's petition, and to confirm the awards. Alfa-Laval argued: (1) The

AAA's determination that the arbitrator need not be removed was a "plausible" decision entitled to judicial deference; (2) no reasonable impression of bias existed because McCormick, Barstow was counsel for Alfa-Laval only in the Superior Court proceedings; and (3) Helm "waived" its right to object to Peterson serving as arbitrator because Helm knew there had been a Peterson-McCormick, Barstow business relationship in 1985 and, armed with that knowledge, should have asked about the parties' present business relationships. The Superior Court in essence agreed with Alfa-Laval.

After the Superior Court entered judgment, Helm timely filed a notice of appeal with the Appellate Court on September 14, 1993. The Appellate Court issued its opinion on May 8, 1995, reversing the Superior Court's decision in part, and remanding the matter for an evidentiary hearing on the arbitrator's bias.

The Appellate Court held, in pertinent part, as follows on the issue of the standard of review:

> "In light of the explicit statutory authorization of judicial determination of 'evident prejudice' of arbitrators as interpreted in *Commonwealth Corp., supra*, 393 U.S. 145, 89 S.Ct. 337 we hold that a trial court considering a petition to confirm or vacate an arbitration award is required to determine, de novo, whether the circumstances disclose a reasonable impression of arbitrator bias, when that issue is properly raised by a party to the arbitration."

App. to Petition for Cert. p. 20.

The Appellate Court issued a modification of opinion upon denial of rehearing. App. to Petition for Cert. p. 65. On August 10, 1995, the California Supreme Court denied Alfa-Laval's request for review, without comment. App. to Petition for Cert. p. 29.

LAW AND ARGUMENT

A. THE PETITION IS PREMATURE AS NO FINAL DISPOSITION EXISTS BECAUSE THE MATTER IS ON REMAND TO THE STATE SUPERIOR COURT FOR AN EVIDENTIARY HEARING AND PETITIONERS FAIL TO SHOW THIS MATTER FALLS WITHIN ANY OF THE FOUR CATEGORIES OF CASES WHERE A STATE COURT DETERMINATION IS FINAL FOR PURPOSES OF 28 U.S.C. SECTION 1257 DESPITE PENDING STATE TRIAL COURT PROCEEDINGS

Petitioners fail to show that this matter falls within any of the four categories of cases in which a state court determination is treated as final under 28 U.S.C. section 1257 where additional proceedings are pending in the state trial court. See, *Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469, 479-484 (1975).[1] No final disposition exists. The Appellate Court remanded the case for an evidentiary hearing on

---

[1] As a threshold matter, Petitioners seek a writ to the wrong court. Petitioners assert jurisdiction exists pursuant to 28 U.S.C. section 1257 (a) because "the decision below . . . concerns Petitioner's ' "[r]ights . . . claimed under the . . . statutes of . . . the United States [Citation omitted]." ' " Petition for Cert p. 2. The California Supreme Court declined Petitioners' request for review. App. to Petition for Cert. p. 29. Where discretionary review by a higher state court is denied, the intermediate appellate court judgment is the highest court from which review is sought. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (appeal pursuant to former 28 U.S.C. 1257 subdivision (2) appropriate from Second Appellate District Court of Appeal where California Supreme Court denied review); *American Railway Express Company v. Levee*, 263 U.S. 19, 20-21 (1923) (writ of certiorari properly addressed to court of appeal since Louisiana Supreme Court jurisdiction is discretionary and that court declined jurisdiction); *Michigan-Wisconsin Pipe Line Co. v. Calvert, Comptroller of Public Accounts, et al.*, 347 U.S. 157, 159-160 (1954) (appeals under former 28 U.S.C. section 1257 dismissed because made from Texas Supreme Court and not Civil Court of Appeals where Texas Supreme Court refused review). The petition here seeks a writ of certiorari to the California Supreme Court, instead of the California Fifth Appellate District Court of Appeal. In addition, the Appellate Court no longer has jurisdiction as the remittitur issued on August 18, 1995. Thus, the petition is inappropriate.

arbitrator bias, waiver of objection to bias, and a determination to vacate or confirm the arbitrator's award. If the award is vacated, the arbitration begins anew. If no partiality is found or objection to partiality was waived, then judgment shall be reinstated. App. to Petition for Cert. pp. 65-67. In short, Petitioners prematurely seek review from this Court when there is yet to be a decision from the Superior Court with probable review by the Appellate Court and the California Supreme Court.

Petitioners ignore the limited exceptions applied by this Court, pursuant to *Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469, 479-484, to hear matters notwithstanding pending trial court proceedings: (1) Petitioners make no showing that a federal issue is conclusive and that the outcome of the further proceedings is preordained; (2) Petitioners make no showing that a federal issue requires decision despite the outcome of the future state court proceedings—although Petitioners argue that contracts will be disturbed as a result of the Appellate Court determination, as discussed below, that determination does nothing more than confirm statutory and decisional law allocation of power to the courts to review arbitrator bias; (3) Petitioners make no showing that a federal question has been finally decided and later review of the federal issue cannot be had whatever the outcome of the case; and (4) Petitioners make no showing that absent immediate review by this Court, the state court decision would result in serious erosion of federal policy. Because this case does not fall within any of the exceptions carved out in *Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469, the petition is premature and should be denied.

B. THE STATE APPELLATE COURT CORRECTLY DECLINED TO ALLOW AAA COMMERCIAL ARBITRATION RULE 19 TO ABROGATE JUDICIAL REVIEW OF ARBITRATOR PARTIALITY BECAUSE STATUTORY AND DECISIONAL LAW RESERVES THE FINAL DECISION ON ARBITRATOR BIAS FOR THE COURTS UPON A PETITION TO VACATE OR CONFIRM AN ARBITRATION AWARD

Petitioners cast the issue as follows: "The lower court's mandated de novo review of the AAA's 'conclusive' decision overruling a party's objection to the arbitrator is simply a refusal to enforce the parties' agreement to arbitrate according to the AAA Commercial Arbitration Rules." Petition for Cert. p. 14. Petitioners argue that this is in contravention of Section 4 of the Federal Arbitration Act, providing that a federal court may issue an order directing that the arbitration "... proceed in the manner provided for in such agreement."

Petitioners misapprehend the applicability of provisions of the Federal Arbitration Act, 9 U.S.C. section 1 *et seq.* ("FAA") and attempt to graft a procedural provision of the FAA onto a state court analysis to argue that a federal court would read the agreement and AAA Commercial Arbitration Rule 19 differently than the State Appellate Court.

The Appellate Court stated that "[t]he parties impliedly agree that this case is governed by the Federal Arbitration Act...." App. to Petition for Cert. p. 6. The parties' agreement, however, included a choice of law provision that made clear: "(1) *the governing law shall be the law of the State of California,* (2) arbitration shall be in Fresno [California]...." In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 477-479 (1989) this Court held that parties remain free to include a choice of law provision providing which state law governs the arbitration claims to which the

arbitration provision of the contract applies.[2] Here, Petitioners' insistence on enforcement of the contract according to its terms under the auspices of section 4 of the FAA is undercut by the existence of the choice of law provision providing for the application of California law and by the parties' reliance on the California Arbitration Act when petitioning the Superior Court to vacate or confirm the arbitration award.

In addition, this Court has never held that FAA section 4 applies in state court proceedings. In *Volt Information Sciences,* 489 U.S. 468, the appellee argued that California Code of Civil Procedure section 1281.2 (incorporated through the choice of law provision in the parties' contract) conflicted with FAA section 4. This Court clarified it had no need to decide whether FAA sections 3 and 4 applied in state court proceedings because, even if fully applicable to state court proceedings, FAA sections 3 and 4 do not foreclose utilization of the California Code of Civil Procedure—the choice of law clause does not offend federal policy. *Id.,* p. 479-480. In so doing, this Court noted FAA section 4 is not applicable to state court proceedings:

> While we have held the FAA's "substantive" provisions—§§ 1 and 2—are applicable in state as well as federal court, see *Southland Corp. v. Keating,* 465 U.S. 1, 12 (1984), we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, see 9 U.S.C. § 3 (referring to 'proceedings brought in any of the courts of the United States'), are nonetheless applicable in state court. See *Southland Corp. v. Keating, supra,* at 6, n. 10 (expressly reserving the question whether '§§ 3 and 4 of

---

[2] See, also, e.g., *Nida Engalla, et al. v. Permanente Medical Group, Inc., et al.,* 37 Cal.App.4th 497, 520-521, 43 Cal.Rptr.2d 621 (1995) (Even where underlying contract involves interstate commerce, parties remain free to include choice-of-law provision).

> the Arbitration Act apply to proceedings in state courts'); see also *id.*, at 29 (O'Conner, J., dissenting) (§§ 3 and 4 of the FAA apply only in federal court).

Id., 489 U.S. at p. 477, n.6.

Petitioners' argument would make every state court analysis of an arbitration agreement subject to federal court review to ascertain whether the federal court would have enforced the contract in the same manner under the authority of FAA section 4. This misconceives the effect of the FAA on state law determinations. This Court held that, recognizing Congress' purpose in providing that the FAA ensure private arbitration agreements are enforced according to their terms, the FAA preempts state laws that require a judicial forum, not arbitration, for resolution of claims. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 478. It does not follow that how a federal court might read and enforce an arbitration agreement preempts the Appellate Court's construction here, which merely affirmed existing federal and state statutory grounds and case law upon which courts may vacate an arbitration award. "[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences,* 489 U.S. at p. 474; See also, *Fox Film Corp. v. Muller,* 296 U.S. 207 (1935) (where judgment of state court rests upon two grounds, one federal and the other nonfederal, this Court will not review if nonfederal ground independent and adequate to support judgment).

Even if Petitioners' premise that the parties' agreement should be construed as a matter of federal law is arguably tenable, nevertheless, both the text of AAA Commercial Arbitration Rule 19 and federal decisional law supports the Appellate Court's determination—there is no discord be-

tween the Appellate Court decision, federal court precedent, and the holdings of this Court.

AAA Commercial Arbitration Rule 19 provides:

> Disclosure and Challenge Procedure—Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. *Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.*

Petition for Cert. p. 5; italics added.

A fair reading of the italicized language allows for the AAA administrator's determination to be conclusive as to the continued service of the arbitrator *in the arbitration proceeding,* thus parties are precluded from *interlocutory* judicial intervention prior to the conclusion of the arbitration. Arbitrator Peterson did not disclose his connection to McCormick, Barstow, pursuant to the first sentence of AAA Commercial Arbitration Rule 19, until after the issuance of his interim award on liability and after repeated demands for disclosure. App. to Opp. to Petition for Cert. pp. A-46 through A-52. The court in *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 681 (7th Cir. 1983) reasoned that because the AAA ethical standards do not have the force of law (even where failure to disclose is a material violation of those standards), it does not follow that the award will automatically be nullified by a court. This is

because the AAA, competing with others offering such service, may "set its standards as high or as low as it thinks its customers want," but the standards it sets in its code of ethics "does not lower the threshold for judicial intervention." *Id.* p. 681.

Under *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, Peterson's failure to disclose to the AAA, in compliance with the first sentence of AAA Commercial Arbitration Rule 19, would not alone *lower* the threshold for vacating the award. By parity of reasoning, any standards set by the AAA for arbitrator bias, and the AAA review of claims of bias pursuant to the last sentence of AAA Commercial Arbitration Rule 19, cannot *raise* the threshold for judicial review of arbitrator bias.

Petitioners' reading, on the other hand, goes too far—it subjugates the statutory and decisional law power of the courts to review arbitrator bias after the arbitration award is issued to the procedural rules of the AAA.[3] Petitioners' misplaced reliance on section 4 of the FAA would result in the abrogation of section 10 of the FAA which provides that a federal court may vacate the award upon application by a party to the arbitration "[w]here there was evident partiality . . . in the arbitrators . . . ." See, also, *Commonwealth Coatings Corp. v. Confidential Casualty Co.*, 393 U.S. 145 (1968). Petitioners' reasoning fails to acknowledge that AAA rules do not have the force of law. (See, *Merit Insurance Co. v. Leatherby Insurance Co., 714 F.2d 673, 680).*

Petitioners argue that allowing the AAA to finally determine arbitrator bias preserves the integrity of the arbitration process. See, Petition for Cert. pp. 24-26. The Appellate

---

[3] See, e.g., *Gebers v. State Farm General Insurance Company*, 38 Cal.App.4th 1648, 45 Cal.Rptr.2d 725 (1995) (insurance company could not dilute the legislative mandate requiring appraiser impartiality by using a policy provision that described the appraisers as "independent.")

Court decision, however, is in harmony with the fundamental principle that justifies narrow judicial review of the merits of an arbitrator's award and thereby preserves the cornerstone of impartiality upon which arbitration rests. Arbitrators are free to decide the merits of the controversy with limited judicial review, provided the arbitrator is neutral, detached, and impartial. To safeguard this cornerstone, Congress, in enacting section 10 of the FAA, and the California legislature's enactment of Code of Civil Procedure section 1286.2, reserved for the courts the final determination of arbitrator partiality or bias. Accordingly, federal courts reviewing challenges to arbitrator partiality under the FAA reason that it is for the court to ultimately decide whether the award should be vacated. The courts have been reluctant to entertain review of arbitrator partiality only where the parties, with knowledge of possible bias, fail to raise an objection during the arbitration process.

For example, the court in *San Carlo Opera Co. v. Conley*, 72 F.Supp. 825 (S.D.N.Y 1946) *aff'd*, 163 F.2d 310 (2nd Cir. 1947) concluded that where a party timely objects to an arbitrator based on bias, and the AAA overrules the objection, the party must proceed with the arbitration; the party will not, however, be precluded from reasserting the bias issue before a court upon a petition to vacate the award. See, also, e.g., *Rogers v. Schering Corporation*, 165 F.Supp. 295 (D.C.N.J. 1958), *aff'd*, 271 F.2d 266 (3rd Cir. 1959) (counsel learned of arbitrator bias from source other than AAA and objected to continuing service of arbitrator at very next hearing. The objection was found to be timely made and preserved for district court review).

Similarly, in *Health Services Management Corp v. Hughes*, 975 F.2d 1253, 1263 (7th Cir. 1992), the court reasoned that if counsel objected to the arbitrator under AAA Construction Industry Arbitration Rules, his objection is preserved for the court's subsequent review; in failing to

object to the AAA, the party waived the right to object. If, however, as in the instant manner, the party has no knowledge of the ongoing business relationships of the arbitrator giving rise to the issue of arbitrator bias, there can be no waiver. *Id.*, at p. 1260. In *Smith v. Prudential Securities*, 846 F.Supp. 978, 980 (M.D. Fla. 1994), the court entertained a challenge of partiality even where the party failed to object to the AAA after disclosure. The court, nevertheless, concluded that the party failed to sustain its burden of showing evident partiality under the FAA.

In sum, instead of deference, the test applied by courts for reviewing failure of an arbitrator to disclose is that articulated by the Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145. To the extent the Appellate Court decision held that a court reviews arbitrator bias *de novo* (without deference to the AAA), the Appellate Court's reasoning is consistent with prior federal decisions and represents a natural expression of existing federal precedent.

Because federal authority is consistent with the decision of the Appellate Court, Petitioners' claim that the Appellate Court decided an important question of federal law which has not been, but should be, settled by this Court lacks merit. See, Pet. for Cert. p. 2. Even if federal cases dealing with the issue of review of an arbitration award, where parties resorted first to the arbitration rules for a decision on arbitrator partiality, did not expressly use the phrase "*de novo*" review, their holdings impliedly support this standard—courts defer to an arbitration body's decision on bias only where the party seeks judicial intervention before conclusion of the arbitration proceedings, or where a party with knowledge of bias, fails to timely object. See, e.g., *San Carlo Opera Co. v. Conley*, 72 F.Supp. 825; *Rogers v. Schering Corporation*, 105 F.Supp. 295; *Health Services Management Corp. v. Hughes*, 975 F.2d 1253; *Smith v.*

Prudential Securities, 846 F.Supp. 978. Here, the steps taken by Respondents are consistent with the facts of the above cases. Respondents asked the AAA to remove the arbitrator pursuant to AAA procedure immediately after becoming aware of the facts evidencing arbitrator bias. Respondents, in writing, timely objected, preserving their objection for judicial review. Therefore, the Appellate Court decision is consistent with federal precedent and need not be reviewed.

Petitioners, on the other hand, cite inapposite case law. For example, Petitioners cite *York Hannover Holding A.G. v. American Arbitration Association et al.*, 92 Civ. 1643 (CSH), 1993 WL 159961, 1993 U.S. Dist. LEXIS 6192 (S.D.N.Y. May 11, 1993). There, the court deferred to a AAA determination regarding arbitrator partiality. That case turned upon the party's attempt to use the court to intervene in the ongoing arbitration proceedings. The court began by outlining the limited ability of the court to interfere with ongoing arbitration proceedings. The court then noted that AAA Commercial Arbitration Rule 19 set out the procedure for objecting to the continued service of an arbitrator. The court concluded that "[a]t *this point in the process*, the court must defer to the decision of the AAA." (Italics added). The court did not hold that deference would be afforded the AAA determination once the arbitrator issued a final award and the party petitioned the court to vacate the award based upon arbitrator bias.

Petitioners cite *First Options of Chicago Inc. v. Kaplan*, ____U.S.____, 115 S.Ct. 1920 for the proposition that courts misconstrue the FAA when they invoke state law or other concerns to override the parties' contractual terms. See, Petition for Cert. p. 12. From this proposition, Petitioners reason that the Appellate Court should have found the AAA's determination on arbitrator bias to be conclusive because the parties' agreement provided for arbitration

under AAA rules. Petition for Cert. p. 14. Petitioners continue to confuse FAA preemption of state law requiring a judicial forum for resolving disputes without arbitration, with the utilization of limited judicial review of arbitration awards.

First Options v. Kaplan supports Respondents' contentions. The Court held that the standard of review applied to an arbitrator's decision regarding arbitrability depended on whether the parties agreed to submit the issue of arbitrability to the arbitrator. *Id.* 1293. If "clear and unmistakable" evidence shows the parties agreed to arbitrate arbitrability, then the standard a court applies is the same as applied to arbitration decisions in general. *Id.* 1924. The Court explained "[i]n this manner the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption [Citation omitted]." *Id.* 1924. Agreement about submitting the question of arbitrability for decision by the arbitrator is fundamentally different from whether arbitration conclusively decides matters reserved for the courts upon a petition to vacate or confirm the award made on claims arbitrated.

Under Petitioners' reasoning, state and federal statutory grounds for judicial review of arbitrator partiality would be displaced—i.e., "who" finally decides arbitrator partiality would shift from the court to the AAA administrator—based upon Petitioners' urged construction of the parties' agreement and AAA Commercial Arbitration Rule 19. Parties reasonably expect that the statutory and decisional law basis for judicial review of an arbitrator's award remains intact. Petitioners' argument undermines not only legislative intent but also the expectation of the parties. The Appellate

Court correctly reasoned that AAA Commercial Arbitration Rule 19 should not be read to effect this shift in "who" ultimately decides arbitrator partiality.

"The standard of review that the [Court] must render in examining 'the record' [when the parties allege arbitrator bias] must be seen in light of the purpose of a court's function in confirming or vacating an arbitration award." *Health Services Management Corp. v. Hughes,* 975 F.2d at 1258. The court has a duty to adequately review the record for alleged instances of evident partiality or other arbitrator misconduct, *Id.,* at p. 1258, n. 3. The Appellate Court's reasoning is made especially compelling by pointing out that since the AAA received a significant fee for appointing Peterson, it had a vested business interest in not making a mid-arbitration decision to disqualify Peterson. This court need not disturb the Appellate Court's decision.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Dated: November 30, 1995

Respectfully Submitted,

THOMAS E. CAMPAGNE
(Counsel of Record)
CLIFFORD C. KEMPER
THE LAW FIRM OF
THOMAS E. CAMPAGNE &
ASSOCIATES
1685 North Helm Avenue
Fresno, California 93727
(209) 255-1637

Attorneys for Respondents

Supreme Court, U.S.
FILED
DEC 6 1995
CLERK

No. 95-725

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO.,
AND ALFA-LAVAL CREDIT AB,
Petitioners,
v.
BRITZ, INC., HELM CONCENTRATES, INC.
AND HELM TOMATOES, INC.,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of California

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS E. CAMPAGNE
(Counsel of Record)
CLIFFORD C. KEMPER
THE LAW FIRM OF
THOMAS E. CAMPAGNE &
ASSOCIATES
1685 North Helm Avenue
Fresno, California 93727
(209) 255-1637
Attorneys for Respondents

91pp

INDEX TO APPENDIX

	APP. PAGE
Letter from Arbitrator John E. Peterson to Messrs. Savrnoch, Strauss, Verticchio and Frame, dated December 6, 1991, granting the issuance of deposition subpoenas requested by Alfa-Laval's co-counsel McCormick, Barstow ..	A-1
Letter from John T. Savrnoch of McCormick, Barstow to Arbitrator John E. Peterson, dated December 2, 1991, requesting the issuance of deposition subpoenas on behalf of Alfa-Laval ..	A-3
Interim award of Arbitrator John E. Peterson in favor of Alfa-Laval, dated May 22, 1992	A-8
Order re motion for reconsideration of interim award of Arbitrator John E. Peterson, dated September 24, 1992	A-25
Declaration of Robert Glassman in support of petition to vacate arbitrator's award on the basis of arbitrator bias, dated December 8, 1992	A-34
Letter from Arbitrator John E. Peterson to Mr. Ted Frame, dated June 25, 1992, denying any special relationship between arbitrator and his law firm to the McCormick, Barstow law firm	A-38
Letter from Arbitrator John E. Peterson to Mr. Ronald McNair of the AAA, dated July 9, 1992, acknowledging referrals from the McCormick, Barstow firm to the arbitrator and/or his law firm while functioning as the arbitrator	A-41

APP. PAGE

Letter from Arbitrator John E. Peterson to Mr. Ron McNair of the AAA, dated July 15, 1992, acknowledging that he was employed as an expert on two separate matters by McCormick, Barstow, co-
counsel for Alfa-Laval, while functioning as the arbitrator A-46

Supplemental declaration of Mr. Ted R. Frame in support of petition to vacate arbitrator's award, dated April 19, 1993 ..... A-53

Letter from Ted R. Frame to Mr. Ron McNair, dated July 21, 1992, requesting that the arbitrator be replaced A-59

Letter from Rocco M. Scanza of the AAA to Messrs. White, Dockterman, Kaplan and Frame, dated August 4, 1992, denying Helm's request to disqualify the arbitrator A-68

Letter from Joan M. Dolinsky to Mr. Rocco M. Scanza of the AAA, dated February 4, 1993, requesting reconsideration of AAA's denial of Helm's request to disqualify the arbitrator A-70

Letter from Rocco M. Scanza of the AAA to Messrs. White, Dockterman, Kaplan, Frame, Vorzimer, Cotkin and Dolinsky, dated February 18, 1993, rejecting Helm's request for reconsideration A-79

Final award of Arbitrator John E. Peterson, dated March 31, 1993 ..... A-81

Supplemental award of attorneys' fees and costs by Arbitrator John E. Peterson, dated May 6, 1993 and filed on May 10, 1993 ..... A-84

[JORY, PETERSON & SAGASER LETTERHEAD]

December 6, 1991

Fax No. (209) 442-1772

John T. Savrnoch, Esq.
McCORMICK, BARSTOW,
SHEPPARD WAYTE &
CARRUTH
Post Office Box 24013
Fresno, California 93779-4013

Fax No. (209) 526-0244

Alan H. Strauss, Esq.
STRAUSS, NEIBAUER,
ANDERSON & RAMIREZ
620 Twelfth Street
Modesto, California 95354-2499

Fax No. (312) 201-2555

Thomas Verticchio, Esq.
WILDMAN, HARROLD,
ALLEN & DIXON
225 West Wacker Drive
Chicago, Illinois 60606-1229

Fax No. (209) 935-1555

Ted R. Frame, Esq.
FRAME & MATSUMOTO
Post Office Box 895
Coalinga, California 93210

Re: American Arbitration Association
Case No. 72-199-2101-90
Helm Concentrates, et al. v. Alfa-Laval, et al.

Gentlemen:

I have Mr. Savrnoch's December 2, 1991 letter requesting issuance of a deposition subpena for the production of documents by L & A Engineering. Mr. Strauss responded by letter dated December 5, 1991, to which he attached a copy of L & A Engineering's Opposition to Motion to Compel, heard by the Superior Court on November 27,

1991. I have read and considered these writings and have researched and analyzed Mr. Strauss' point that discovery is not available to parties in arbitration unless it has been agreed.

California Code of Civil Procedure Section 1283.1(b) states:

> Only if the parties by their agreement so provide, may the provisions of Section 1283.05 be incorporated into, made part of or made applicable to, any other arbitration agreement.

Section 1283.05 governs the taking of depositions and discovery in arbitration proceedings.

Although the arbitration provisions of the contracts at issue in this arbitration do not specifically incorporate Section 1283.05, this arbitration has proceeded for some months during which a substantial amount of discovery has occurred, apparently by agreement of the parties. Thus, the arbitrator will issue the deposition subpena as requested by Alfa-Laval, and invites counsel's attention to CCP Section 1282.6. The arbitrator will be available for signature of the filled-in subpena.

Very truly yours,

/s/ JOHN E. PETERSON
John E. Peterson

JEP/rs

cc: Mr. Ron McNair
Case Administrator

[LETTERHEAD]

December 2, 1991

John E. Peterson, Esq.
JORY, PETERSON & SAGASER
P.O. Box 5394
Fresno, CA 93755

Re: *AAA — Case No. 72-199-2101-90: Helm Concentrates, et al., v. Alfa-Laval, et al.*

Dear Mr. Peterson:

As the assigned AAA arbitrator in the above-referenced case, this letter is to serve as a request for the issuance of deposition subpoenas. Alfa-Laval seeks to discover what it believes to be highly relevant information from a non-party and seeks to have the deposition subpoenas issued under your authority as arbitrator in this matter.

Alfa-Laval seeks to discover certain technical drawings from L&A Engineering, a contractor involved in the design and installation of certain "upstream" equipment at the Helm plant. The documents sought to be discovered were previously the subject of a Motion to Compel in Fresno County Superior Court which was heard on November 27, 1991. The Motion to Compel was denied by the court due to the fact that the Superior Court action has been stayed pending arbitration.

L&A Engineering, Inc. fabricated, or installed, the majority of the equipment within plaintiff's tomato processing facility. It is critical for defendants' defense in the arbitration proceeding to determine how the facility was designed and operated in total because plaintiffs' damages allegedly resulted from the design and operation of Alfa-Laval equipment within plaintiffs' tomato processing facility.

On or about September 13, 1991, Alfa-Laval caused to be served on L&A Engineering a subpoena for the production of documents. On September 25, 1991, Thomas J. Verticchio, one of the attorneys for Alfa-Laval, had a telephone conference with Mr. Alan Strauss, one of the attorneys for L&A Engineering, in which it was agreed between Mr. Verticchio and Mr. Strauss that because of L&A's objections to the scope of the subpoena, L&A would be relieved of its obligation to respond to the subpoena at that time.

It was agreed that L&A Engineering would allow Mr. Verticchio to inspect L&A's documents at L&A's offices on or about October 11, 1991. On October 11, 1991, Mr. Verticchio met with Mr. Strauss and Mr. Frank Byrom, president of L&A Engineering, at L&A's offices for the inspection of documents.

Mr. Strauss and Mr. Byrom advised Mr. Verticchio that certain documents would not be produced for inspection or duplication as it was the position of L&A, and its counsel, that those documents were proprietary in nature.

Attorneys and consulting experts of Alfa-Laval have analyzed the documents that were produced by L&A and believe the information they require from L&A in order to defend this arbitration is not contained in those documents but rather is contained in the documents which L&A has refused to produce.

Among documents which were produced for inspection and duplication by L&A were documents which purported to be the complete correspondence file between L&A Engineering and Helm Concentrates, Inc., Helm Tomatoes, Inc. and Britz, Inc. for the relevant time period. However, attorneys for Alfa-Laval have since discovered through document subpoenas served on other non-parties that correspondence between L&A Engineering and Helm Concentrates, Inc., Helm Tomatoes, Inc. and Britz, Inc. has not been produced. Because certain correspondence contained in L&A's files have not been produced, it is appropriate that the complete file of L&A's correspondence come within the scope of the subpoena.

Retained experts for Alfa-Laval have indicated that it is necessary to further analyze documents that L&A Engineering did not produce. The necessity is based upon the fact that the performance of "upstream" equipment would greatly affect the performance of the entire facility and more particularly the equipment installed by Alfa-Laval.

By this letter, the attorneys for Alfa-Laval respectfully request that a records only deposition subpoena be served upon L&A Engineering, Inc. for the following documents:

a. All as-built drawings, blueprints, and/or final shop drawings for all equipment installed by L&A Engineering and/or Dennis Design at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

b. All documents, drawings, blueprints, and/or shop drawings setting for the temperature profiles and/or product flow profiles for any and all equipment installed by L&A Engineering and/or Dennis Design at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

c. All documents, drawings, blueprints, and/or shop drawings depicting the specifications and/or dimensions of any and all equipment, including tanks, installed by L&A Engineering, Inc. and/or Dennis Design at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

d. All other documents, drawings, blueprints, and/or shop drawings depicting the design and/or operation of any and all equipment installed by L&A Engineering and/or Dennis Design at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

e. All timesheets and/or job records indicating the days and/or times employees or agents of L&A Engineering performed work at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

f. All correspondence between L&A engineering and HELM CONCENTRATES, INC., HELM TOMATOES, INC., and BRITZ, INC. referring or relating to work done by L&A Engineering for those entities between January 1, 1989 to the present.

A copy of this request for deposition subpoena is also being forwarded to Mr. Ted Frame, attorney for Britz, Inc., Helm Concentrates, Inc. and Helm Tomatoes, Inc.

As the arbitration date is scheduled for January 6, 1992, we respectfully request that action be taken on this request as soon as feasible. Thank you for your consideration of this matter.

Very truly yours,

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH

/s/ JOHN T. SAVRNOCH
John T. Savrnoch

JTS/cp

cc: Ted Frame
Craig White

JORY, PETERSON & SAGASER
555 West Shaw Avenue, Suite C-1
Post Office Box 5394
Fresno, California 93755

Telephone: (209) 225-6700

John E. Peterson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION
LOS ANGELES DIVISION

In the Matter of: ALFA-LAVAL FOOD AND DAIRY CO., a division of ALFA-LAVAL, INC., and ALFA-LAVAL CREDIT AB, *Petitioners,* and HELM CONCENTRATES, INC., BRITZ, INC., and HELM TOMATOES, INC., *Respondents.*	American Arbitration Association Case No. 72199 2101 90 AWARD OF ARBITRATOR

I
INTRODUCTION

Hearing was held in this case at the Marriott Courtyard, 140 East Shaw Avenue, Fresno, California beginning on January 6, 1992, at 9:00 a.m. before John E. Peterson, Esq.,

arbitrator, and Cindy Pickens-Jensen, certified shorthand reporter. Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., and Alfa-Laval Credit AB (hereinafter "Alfa") appeared by Wildman, Harrold, Allen & Dixon, by Craig M. White, Michael Dockterman and Thomas J. Verticchio; and Helm Concentrates, Inc., Britz, Inc., and Helm Tomatoes, Inc. (hereinafter "Helm") appeared by Frame & Matsumoto, by Ted R. Frame.

Arbitration was held pursuant to the Rules of Commercial Arbitration of the American Arbitration Association under arbitration provisions contained in three contracts by which certain tomato processing equipment was provided by Alfa to Helm in the Spring and Summer of 1990.

Alfa initiated this arbitration by petition alleging that Helm breached three equipment contracts by failing to pay the amounts due to Alfa after Alfa had delivered and installed the equipment in a tomato processing plant owned by Helm. Helm's counter-claim alleges that Alfa was guilty of various forms of misrepresentation and breach of warranties. Each party raised affirmative defenses to the other's allegations.

The parties agreed that the arbitration would be bifurcated so that after the initial hearing, the arbitrator would decide upon issues of liability, leaving proof of damages for a subsequent hearing.

The arbitrator has considered post-hearing briefs submitted by both sides, the oral testimony provided by witnesses called during the hearing, exhibits proposed and admitted during the course of the hearing, and makes the following findings of fact and conclusions of law as to the respective liabilities of the parties.

II

FACTUAL BACKGROUND

Alfa is a multi-national corporation headquartered in Sweden with offices in United States. It is engaged primarily in the manufacture and sale of various types of food processing equipment, with varied application.

Helm Concentrates, Inc. is a California corporation organized to construct and own a tomato processing facility on real property owned by Britz, Inc. Helm Tomatoes, Inc. is a California corporation organized for the purpose of leasing the tomato processing facility from Helm Concentrates, Inc. and operating it to process tomatoes.

The Helm tomato processing facility was built and equipped in furtherance of a Tomato Products Packing Agreement with Borden, Inc. assigned to Helm Tomatoes, Inc. in September 1989. The minimum term of the Agreement was seven years, and required Helm to provide annual quantities of tomato products meeting Borden's quality standards. The Helm/Borden Agreement required a minimum of 17 million pounds of tomato paste, 12 million pounds of diced tomatoes and 2 million pounds of crushed tomatoes. The Agreement required Borden to provide six months' notice of the amounts of these tomato products Borden required from the tomato crop grown following the notice.

Late in the Summer of 1989, Helm representatives began the task of building and equipping a tomato processing facility which was to begin operation in time to accept tomatoes harvested in June, July and August 1990. Robert Glassman and Claude Luster, without the services of an architect or a general contractor, shared the responsibilities for the construction of the Helm facility and the purchase of the equipment to be installed in it. Glassman and Luster intended to rely on design-build services provided by the

vendors of the building and equipment. Glassman was responsible for legal, regulatory and financial issues, and Luster was responsible for selecting equipment for the facility and for some of the subcontracting.

Helm Concentrates purchased tomato processing equipment from L&A Engineering and Equipment, Inc. ("L&A"), FMC Corporation ("FMC") and Alfa. These contracts were signed in October and November 1989. The L&A and FMC equipment was installed "upstream" from the Alfa equipment, so that tomatoes processed by the Alfa equipment had first to pass through the L&A and FMC equipment.

On November 20, 1989, Luster signed the Helm Concentrates/Alfa-Laval Agreement by which Helm purchased for approximately $1,426,000 an aseptic processing system for tomato paste and tomato crush. The system for rendering tomato paste commercially sterile utilized scraped surface heat exchangers known as Contherm units, arranged in two lines. The system for rendering tomato crush commercially sterile utilized a tubular heat exchanger known as Spiratech, arranged in one line.

On December 8, 1989, Helm entered into an agreement for the purchase of sterile packages from Alfa, and on the same date, entered into a lease agreement with Alfa for the rental of three StarAsept filling machines. Two of the filling machines were to be used on the crush line, and one on the paste system. It is Alfa's performance of these three agreements that form the subject matter of this arbitration.

The Helm tomato processing facility included three buildings — a processing building, a utility building and a warehouse. All three buildings are structural steel construction on concrete foundations. The process building was totally enclosed in April 1990; the warehouse in early May 1990; and the utility building in July 1990.

Installation of the Alfa equipment began on April 18, 1990. The installation of the paste system was completed on June 15, 1990, and the installation of the crush system was completed on June 26, 1990.

Paste production began on July 8, 1990, crushed tomato production on July 22, 1990, and diced tomato production on July 25, 1990.

Production continued until September 2, 1990. The Alfa paste system was not operated after August 30, 1990.

During production, problems arose with the production equipment, including that of L&A and Alfa. Delays occurred in the processing of tomatoes delivered to the plant. Many of the growers who had contracted to deliver tomatoes to the plant were told not to do so. Helm and Alfa disagree as to the cause of the problems. In any event, on November 9, 1990, Borden canceled the Tomato Products Packing Agreement for failure to supply the minimum annual quantity of products to Borden during the 1990 fiscal year.

In December 1990, Helm wound down its operations, and terminated operations and all employees on January 4, 1991. Helm sold substantially all of the assets of the tomato processing facility to Hunt-Wesson, Inc. by written agreement dated February 5, 1991. The Alfa equipment and bags were excluded from the sale to Hunt-Wesson. In March, 1991, Alfa and Helm reached an agreement whereby Alfa attained possession of the equipment and the bags for the purpose of reselling them.

On October 10, 1990, Alfa demanded arbitration against Helm, seeking an award of money damages, interest, costs and attorney fees. In response, Helm denied all Alfa's allegations an filed a counter-claim and amended counter-claim seeking rescission of the three contracts, and money damages in excess of $42 million. Alfa has denied all of the

allegations of Helm's amended counter-claim and has interposed affirmative defenses which will be discussed below.

III

THE MISREPRESENTATION CLAIMS

The Helm Respondents seek rescission of the three Alfa agreements, return of money already paid as purchase price and rent, and consequential damages based on Alfa's alleged intentional and negligent misrepresentation and non-disclosure of known facts. Helm's post hearing briefs focused on the negligent misrepresentation theory as the basis for rescission and damages, and appeared to abandon the theories of intentional misrepresentation and non-disclosure of material facts. In any event, the arbitrator finds that Alfa made no intentional misrepresentations, and did not fail to disclose material facts in connection with the three agreements which form the subject matter of this arbitration. This portion of the award will address the negligent misrepresentation theory proposed by Helm.

Helm's primary claim is based on alleged negligent misrepresentations which induced the execution of the three contracts. Specifically, Helm alleged that Alfa represented that the Aseptic tomato paste lines could be "cleaned in place" in two to three hours, and that the Contherm units in the Aseptic paste lines would have continuous run times of 10 to 12 days. Helm's position is that these representations were made by Alfa representatives during negotiation of the equipment contract (Helm Exhibit 37) and that these representations were false. Helm further alleges that it reasonably relied on these representations in the execution of the equipment contract.

During negotiation of the equipment contract, Helm's overriding concerns were to build the facility in time to meet the production requirements of the Borden Contract, and to

build a facility which could be used to process other foods. The Borden Contract imposed severe time pressures on Helm.

For its part, Alfa was keenly interested in entering the market of providing its equipment to the California tomato processing industry. As of the time during which the equipment contract was being negotiated, Alfa had not provided Contherm units for use in sterilizing California tomato paste.

Claude Luster, well trained and experienced in the tomato processing business, was very familiar with the uniqueness and flow characteristics of California tomato paste. He testified that he provided that information to Alfa during the negotiation of the equipment contract. He also knew from his experience that Alfa had no Contherm units sterilizing California tomato paste. Also, as a person experienced in plant start-up in the food processing industry, Mr. Luster must have known that firms like Alfa, which combine design and engineering services with product manufacture, are constantly faced with new and different applications of their equipment. Each builder of a food processing plant has its own peculiar problems and products, and part of the service Alfa provides is to solve one-time sets of proposed applications of its equipment.

Mr. Luster testified about communications he had with Evan Klintner about processing California tomato paste and Alfa's experience in that area. Part of that testimony follows (RT. 288:4-19):

> And so we characterized the produce to him as being a very viscous product, and he indicated that he saw no problem with that. We asked him regarding the experience of Alfa-Laval in terms of tomato processing. He indicated that a lot of Alfa-Laval's projects were confidential and he couldn't get into the exact nature of where

they were or what particular products they were working with, but he did indicate that they had a facility in Italy; they had a facility in Australia, I think. And they had facilities around the world that he could not designate as to what they were doing and why they — and how they were doing it, but basically indicated that he didn't see the particular product that we were working with as a challenge.

This testimony best capsulizes the nature of the communication between Alfa and Helm that led up to the signing of the equipment contract by the parties. No facts were misrepresented in this conversation. The arbitrator finds that there were no material facts misrepresented by Alfa to Helm during negotiation. Both Helm and Alfa were fully familiar with the problems involved in building, starting up and operating a tomato processing facility as contemplated by Helm.

Helm urges strenuously that Alfa misrepresented its equipment as permitting clean in place in a two to three-hour time frame, and as permitting continuous runs of 10 to 12 days. Although it is clear that Alfa made such communication to Helm during the negotiation, it is also clear that that communication is not of a material fact. Rather, it is a promise by Alfa to Helm to provide paste sterilizing equipment that would meet these time parameters. This promise found its way into the equipment contract at paragraph 1.1, entitled "General," as follows:

> The most common mode of operation is continuous, with stops only for breakdown repair. The approach taken in this proposal allows for such a mode of operation, although it is not our recommended plant operation plan. Planned shut-downs with minor maintenance will save the equipment, increase plan utilization and give an overall more economic operation. The design presented here allows for both modes of operation. We recommend one

shut-down and CIP including inspection of wear parts once every 10-12 days. A shut-down would last 2-3 hours.

In California, the general rule is that, in the absence of an intent not to perform, the mere making of a promise which the promisor fails or refuses to perform does not constitute actionable fraud, since a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform does not change its character. *Reingans v. Smith* (1911) 161 Cal. 362, 119 Pac. 494. Failure to make good a promise is merely a breach of contract which may be a ground for an action for damages. See 34 *Cal.Jur. III* (3rd ed. 1977) Fraud and Deceit, §20, and cases cited at footnotes 71 and 72. The arbitrator finds that both Helm and Alfa knew that Contherms had not been used to process California tomato paste, but that Alfa reasonably believed that the Contherm units could achieve 10 to 12 days continuous running time, with 2 to 3-hour shut-downs.

Prior to negotiation of the equipment contract, Alfa had provided Contherms for use on extremely viscous products, and had provided Contherms for use in Italian and Australian tomato paste processing. These applications, combined with its history of past successes in engineering applications could reasonably provide the basis for the promise made in the equipment contract concerning run times and shut-down times.

A different conclusion is not indicated by any of the cases cited by Helm in its post-trial briefs, nor revealed by independent legal research by the arbitrator. The court in *Continental Airlines v. McDonnel Douglas Corp.* (1989) 216 Cal.App.3d 422, 264 Cal.Rptr. 779, in ruling that the trial court did not prejudicially err in admitting parol evidence under the fraud exception to the Parol Evidence Rule, distinguished between promissory language (inadmissable under the fraud exception to the Parol Evidence Rule) and factual representation (admissable under the fraud excep-

tion to the Parol Evidence Rule). In *Continental Airlines,* the contract negotiated by the parties by which Continental acquired its fleet of DC-10 aircraft contained a specification which stated, in part "the failure mode is *not likely* to rupture the integral wing fuel tank or fuel lines."

In a pre-contract brochure, McDonnell Douglas made this promise for the DC-10: "The fuel tank *will not rupture* under crash load conditions." Since this promissory language was inconsistent with the language of the contract, the court held that admission of that brochure was error.

In contrast, other brochures made *factual* representations and were held admissible under the fraud exception to the Parol Evidence Rule. Examples of these admissible *factual* representations are (*Continental Airlines,* 216 Cal.App.3d 422, 264 Cal.Rptr. at 798, *supra*):

> The structure is designed and tested for crashworthiness. The landing gear, flaps and wing engines/pylons *are designed* for wipe-off without rupturing the wing fuel tank or fuselage shell structure.
>
> and
>
> These multiple load paths [on the wing] *are designed* to provide strength greater than that of the gear itself in order to prevent rupture of the fuel tank in the event of impact with some obstacle during the landing and taxiing,
>
> and
>
> Under crashloading conditions, the main landing gear *is designed* to break away from the wing structure without rupturing fuel lines or the integral wing fuel tank.
>
> and

> The [wing] support structure *is designed* to a higher strength than the gear to prevent fuel tank rupture due to an accidental landing gear overload. (Emphasis added.)

The court held that these four representations from the pre-contract brochures, which unequivocally announced that the landing gear breakaway design was then a *fait accompli*, were admissible as *factual* representations by Douglas to Continental that it had already accomplished its safety-oriented design for that particular feature of the aircraft. *Continental Airlines, supra*, 216 Cal.App.3d at 423, 264 Cal.Rptr. at 798.

There was no evidence provided in this arbitration to the effect that Alfa represented to Helm that Alfa had run California tomato paste through Contherm units and had observed that these units would permit 10 to 12 days continuous running, with 2 to 3-hour shut-downs or that the Contherm units were so designed. Rather, it was clear to Helm, from the testimony and the documents, that Alfa had no experience in the processing of California tomato paste and was interested in beginning to provide its equipment to that market.

Another species of fraud in California is making a promise without any intention of performing it. On analysis, this amounts to a misrepresentation of an existing fact, that is, the fact of the state of mind of the promisor. In this arbitration, it affirmatively appears that Alfa had every intention of providing aseptic paste lines which would run continuously for 10 to 12 days, with 2 to 3-hour shut-downs.

To make a long story short, Alfa made no misrepresentation of a material *fact*. Alfa made contractual commitments to Helm based on its past successes and its perhaps optimistic assessments of the capabilities of its Contherm units.

IV

CONTRACT CLAIMS

Alfa committed to provide a tomato paste processing system to Helm which would produce aseptic tomato paste at the rate of 25,366 pounds per hour. The system was to be capable of continuous runs of 10 to 12 days, interrupted by two to three hour shut-downs. Alfa and Helm understood that this system was to operate consistently over a 75 to 90 day tomato processing season.

According Helm's tomato packing tally sheets (Alfa Exhibit 179) production began on July 8 on the Alfa paste line and concluded on August 30. In that time, there occurred a number of shut-downs during which the Alfa paste lines were cleaned in place. Manual cleaning was necessary because of the presence of tomato fibers and caramelized "burn-on" in the heating Contherms. It does not appear that any of these shut-downs approached the two to three hour time limit set forth in paragraph 1.1 of Exhibit 1 to the equipment contract. For the most part these shut-downs were of a 10 to 12-hour duration. It was necessary for Helm to clean the units by hand, change seals by hand, inspect wear parts and manually connect and disconnect the paste lines to and from the hot divert system.

During the July 8 to August 30 time frame, there were two occasions during which the Alfa paste line achieved the 10 to 12-day continuous run. The parties dispute whether these runs should be considered effective. Helm argues that they should not, because septicity problems arose during these runs. Helm's expert, John Westcott, testified that one could expect only 3 to 4-day run time's from Contherm units under all circumstances.

Helm's tally sheets for the Alfa paste lines show that there were a number of hours during the processing of aseptic paste during which the contract rate of

25,366 pounds per hour was met. However, on average over the July 8 to August 30 time frame, the rate was 60 to 80 percent of the contract rate.

The equipment contract sets forth a number of performance guarantees in Section 8. Subsection 8.1 sets forth the terms of the aseptic warranty; subsection 8.2 sets forth the warranty with respect to capacity; and Section 8.3 requires Helm to perform certain conditions precedent to the effectiveness of the aseptic warranty and the warranty with respect to capacity. Alfa's promises regarding run time and shut-down time are not specifically addressed in the equipment contract. However, Section 3 of the plant completion procedure (Exhibit 5 to the equipment contract) sets forth general procedures governing the circumstances in which Alfa has specified guaranteed criteria for the performance of the plant determinable by performance tests. This section appears to permit Alfa 9 months to remedy any failures of performance related to run time and duration of shut-down.

Pursuant to the provisions of Subsection 8.1 of the equipment contract, samples of processed paste were provided to the National Food Laboratory. The samples were taken from production of paste from July 13 through July 16, and delivered to the National Food Laboratory on July 18. On July 31, by letter, the National Food Laboratory advised Alfa that no lactic acid bacteria were detected in the product at the dilutions tested. This testing satisfies the aseptic warranty in subsection 8.1 of the equipment contract.

The procedures for capacity tests set forth in subsection 8.2 regarding the warranty with respect to capacity were not followed by the parties during the operation of the Alfa paste lines. Likewise, no performance tests were done with respect to the continuous run time provision or shut-down duration. It is clear that the omission of these testing procedures resulted from the extreme time pressures under

which both Helm and Alfa operated during the telescoped 1990 processing season at the Helm facility.

It is the arbitrator's conclusion that the tomato production losses at the Helm facility in 1990 resulted from mechanical failures and breakdowns which might or might not be related to the Alfa equipment for the reasons set out below. This conclusion relates to and covers Alfa's contractual obligation to provide aseptic paste at 25,366 pounds per hour, but not to its obligation to provide 10 to 12-day run times interrupted by a 2 to 3-hour shut-downs for CIP.

Alfa personnel in various numbers were present at the Helm facility continuously during the plant operation in the summer of 1990. The arbitrator concludes that the Alfa representatives made good faith efforts to adjust and improve the operation of the Alfa equipment. Alfa personnel were barred from the Helm facility on and after September 18, 1990, four days after Helm filed in Fresno County Superior Court Action against Alfa setting forth the allegations that are now the subject of this arbitration.

Helm points to actual paste production figures which are on average well below the promised aseptic paste production rate of 25,366 pounds per hour. However, the arbitrator credits the testimony of Messrs. Lowen and Madeiros as to the limited capacity of the upstream equipment provided by L&A Engineering. This limited capacity of the upstream equipment makes it virtually impossible to draw accurate conclusions as to whether the Alfa paste lines could consistently produce aseptic paste at the rate of 25,366 pounds per hour. The upstream equipment limit factor is further complicated by Helm's refusal to provide Alfa sufficient time within which to provide appropriate repairs or redesign of the paste lines. Finally, the questionable state of the utilities provided by Helm, although not a determinative factor, cuts against Helm sustaining its burden of proof on its contract claims regarding capacity.

Helm produced evidence to the effect that there were sterility problems at times during paste production by the Alfa Contherms. Helm specifies July 22 through July 26 and August 11 through August 21. However, Ms. Naito, Helm's laboratory technician, testified that she did not determine the cause of the July spoilage, and she laid the August sterility problem to the filler.

Many of the bins which Helm believed might be septic were shipped to cold storage. Approximately 1,500 of these bins were later sold on the open market. In any event, the failure to give Alfa adequate time, the capacity and mechanical problems with the upstream equipment and the failure of Helm to provide adequate utilities render accurate assessment of these sterility problems too difficult to warrant a conclusion that Helm has carried its burden of proof on its breach of contract claim regarding capacity. In essence, the arbitrator finds in favor of Alfa on its defense that Helm failed to perform its part of the equipment contract, as set forth in subsection 8.3.

With respect to Alfa's obligation to provide aseptic paste processing equipment which would maintain 10 to 12-day run times interrupted by 2 to 3-hour shut-downs CIP and maintenance, the arbitrator concludes that the Alfa equipment failed, and that no amount of additional time or effort would have enabled the equipment to operate in accordance with Alfa's commitment. However, under all of the circumstances of this case, the arbitrator concludes that this obligation did not go to the heart of the contract, and can be compensated by money damages as a credit as to amounts due Alfa from Helm on account of delivery and installation of the Alfa equipment. Further, the arbitrator concludes that the problems with the upstream equipment and the problems with the utilities had some effect on the run time/shut-down time commitments but not substantial enough to excuse Alfa from these commitments.

California "case law has uniformly held that a failure of consideration must be 'material,' or go to the 'essence' of the contract before rescission is appropriate." *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 404, 149 Cal.Rptr. 626, 633. Partial failure of consideration may not discharge the other party's obligation under the contract. As noted in 1 Witkin, Summary of California Law (9th ed. 1987) *Contracts*, §758 "the court will consider such factors as extent of performance or preparation and good faith of the defaulting party, the hardship on him of a termination of the contract, the adequacy of damages to compensate the other party for the default, etc. (See Rest. 2d Contracts Section 241; 3A Corbin Section 704 et seq.; 1 Williston 3rd Section 842 et seq.; 21 A.L.R. 2d 1247 . . .)."

Under all of the circumstances of this case, the arbitrator finds the failure of the Alfa equipment to provide 10 to 12-day run times interrupted by 2 to 3-hour shut-downs is a partial failure of consideration which can be adequately compensated by damages as a credit on the amounts due Alfa on account of the installation and delivery of the Alfa paste processing equipment.

V

CONCLUSION

This interim award is hereby entered in favor of Alfa, on each of (1) the equipment contract of November 20, 1989; (2) the bag contract of December 8, 1989; (3) and the filler lease of December 8, 1989. Alfa is entitled to money damages and interest. Each side will bear its own costs and attorney fees.

Helm is entitled to a credit based on the repossession and disposition by Alfa of the equipment, StarAsept filler and bags, and a credit based on the reduced value of the equipment on account of its inability to meet the 10 to

12-day run time duration and 2 to 3-hour shut-down time. This award is entered against Helm Concentrates, Inc., the primary obligor under these three contracts, and against Britz, Inc., the guarantor.

Having found that Helm had no right to rescind the three contracts, the Arbitrator finds it unnecessary to reach Alfa's affirmative defenses of ratification, delay in rescission, Helm's bad faith conduct, and accord and satisfaction.

The Arbitrator commends the attorneys for both sides on their consistently excellent presentations and on their maintenance of a collegial atmosphere throughout the arbitration process.

DATED: May 22, 1992.

/s/ JOHN E. PETERSON
John E. Peterson, Arbitrator

JORY, PETERSON & SAGASER
555 West Shaw Avenue, Suite C-1
Post Office Box 5394
Fresno, California 93755

Telephone: (209) 225-6700

John E. Peterson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION
LOS ANGELES DIVISION

In the Matter of: ALFA-LAVAL FOOD AND DAIRY CO., a division of ALFA-LAVAL, INC., and ALFA-LAVAL CREDIT AB, *Petitioners,* and HELM CONCENTRATES, INC., BRITZ, INC., and HELM TOMATOES, INC., *Respondents.*	American Arbitration Association Case No. 72199 2101 90 ORDER RE MOTION FOR RECONSIDERATION OF INTERIM AWARD

I

INTRODUCTION

Following entry and service of the interim award of Arbitrator in this case, Respondents Helm Concentrates, Inc., Britz, Inc., and Helm Tomatoes, Inc. (hereinafter

"Helm") moved for reconsideration of the interim award. Petitioners Alfa-Laval Food and Dairy Co. and Alfa-Laval Credit AB (hereinafter "Alfa") responded. Having considered the points and authorities provided by Helm in support of its motion, Petitioner's memorandum in response and Helm's closing memorandum, the Arbitrator has re-examined his award dated May 22, 1992, in its entirety, and supplements that interim award as follows.

II

FACTUAL BACKGROUND

To the extent that the Arbitrator finds additional material facts, those facts will be set forth more particularly in the following sections.

III

THE MISREPRESENTATION CLAIMS

A. *Promises v. Representations*

The Helm Respondents insist that Alfa's communication about the cleaning time and continuous run time of its Contherm processing lines were misrepresentations rather than promises or predictions as to those facets of the processing lines. They pluck the phrase "the design presented here" from Section 1.1 of the project description in the Alfa-Helm Agreement as evidence supporting this conclusion.

In fact, that phrase appears in the sentence "The design presented here allows for both modes of operation." Those modes of operations were described earlier in Section 1.1 of the project description as continuous running with stops only for breakdown and repair, or planned shut-downs with minor maintenance. There was no evidence from which the Arbi-

trator could conclude that "the design presented here" would not in fact allow for both modes of operation.

In *Continental Airlines v. McDonnell-Douglas Corp.* (1989) 216 Cal.App.3d 422, 264 Cal.Rptr. 779, the language ruled to be that of representation rather than promise specified already existing design. In this case, the language "we will recommend one shut-down and CIP including change of minor wear parts once every 10-12 days. A shut-down would last 2-3 hours" implies that the system will meet those time parameters. The quoted language does not represent that those time parameters have been designed into the system or actually met in past applications.

In Helm's closing memorandum, the Arbitrator's attention is invited to 15 statements from the Alfa-Helm Agreement noting aspects of the system designed by Alfa to be already designed. Each of these 15 citations tends to support the interpretation of the time parameters language as that of promise, because in each of these 15 instances there is a much greater degree of specificity as to exactly what the system and its various parts will do.

In the overall context of the Alfa-Helm Agreement, and of all of the testimony presented as to the CIP shut-down and run times, the Arbitrator concludes that the language at issue was that of promise and not a representation of existing fact. In any event, as has already been noted, whether this was representation of existing fact or promise of future performance, the CIP shut-down and run times language is not essential to the purpose of the Alfa-Helm Agreement. It is simply one aspect of the overall promise by Alfa to provide a system which would produce aseptic tomato paste at a rate of 25,366 pounds per hour over the expected duration of the tomato processing season of 75 to 90 days. If the latter production capability is met, it simply does not matter whether or how many shut-downs occur for CIP.

B. *Inherent Capabilities*

Helm has cited three United States Court of Appeals cases in support of the theory that Alfa's statements about run times and shut-down times were statements of the inherent capabilities of its equipment, and were representations, not merely promises or predictions of future performance. These cases are inapposite. In *Clements Auto Co. v. Service Bureau Corp.* (8th Cir. 1971) 444 F.2d 169, a panel of the United States Court of Appeals for the Eighth Circuit interpreted Minnesota law, which permits a cause of action based on innocent misrepresentation. There is no comparable cause of action in California.

The court in *Dunn Appraisal Co. v. Honeywell Information Systems, Inc.* (6th Cir. 1982) 687 F.2d 877, cited *Clements Auto Co.* for the proposition that:

> General representations that data processing equipment will be suitable for a customer's operations, based upon familiarity with both the equipment's capabilities and the customer's needs, are statements concerning present facts.

However, this comment was made in a factual context in which a relationship of trust and confidence was found to have existed between a representative of Honeywell and a representative of plaintiff, and in a situation in which there was testimony that a Honeywell engineering employee had recommended to the Honeywell salesman against the Honeywell system that was sold to plaintiff. In addition, Honeywell had promised to convert all of plaintiff's programs, knowing that it had no intent to do so.

In our case, Claude Luster and the Alfa representatives knew that there had been no tomato processing plant handling California tomato paste by the use of Contherm units in the numbers and configurations set forth in the Alfa-Helm Agreement. In the overall context of the negotiations

and the Alfa-Helm Agreement, the representations regarding continuous run time and shut-down time were representations of prediction or of promise rather than of existing fact.

Helm cites *Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 Fed.2d 658 as similar in effect to *Clements Auto* and *Dunn Appraisal*, in applying California law. However, in *Glovatorium*, NCR Corp. had sold a computer system with actual knowledge of its defects, and covered up those defects. No such facts appear in our case.

In addition, in *Glovatorium*, the court expressed the proposition that "fraud is properly inferred from the immediate failure to perform a promise." 684 F.2d at 681. In our case, although the tomato paste processing system did not ultimately reach the promised continuous run time or CIP shut-down time, the system was approaching the promised times, until Helm prematurely barred Alfa from the processing plant.

In any event, Helm has failed to prove by a preponderance of the evidence that even if the representations about continuous run time and CIP shut-down time were representations of fact rather than promises, the representations were material or that Helm relied on them.

IV

CONTRACT CLAIMS

Helm argues that the evidence adduced during the arbitration hearing clearly establishes the materiality of the promises regarding run time and shut-down time, and that the interim award applied the wrong standard in its conclusion as to materiality. Helm argues that there is a special standard in the sale of goods that must be applied in commercial contexts such as existed with respect to the Alfa-Helm Agreement. Helm urges the Arbitrator to apply

the "substantial impairment" standard to the evidence of this case and to thereupon permit rescission of the Alfa-Helm Agreement.

Alfa argues that the "substantial impairment" test applies only to acceptance of revocation, and that traditional contract rescission analysis should be applied to the issue of whether the Alfa-Helm Agreement can be rescinded.

In the interim award, the Arbitrator addressed the materiality standard applicable in traditional "rescission and damages" cases in California contracts. After considering that standard again in light of the evidence adduced during the hearing of this case, the Arbitrator continues to believe that Helm failed in its burden of proof as to the materiality of the breach regarding run time and shut-down time, and that in any event, Helm failed in its burden of proving that it provided upstream equipment and utilities which would permit the Alfa processing lines to produce paste at the contracted rate of 25,366 pounds per hour. Further, Helm failed in its burden of proving that it had provided Alfa sufficient time within which to provide appropriate repairs, adjustments or "redesign" of the paste lines.

At Helm's request, the Arbitrator has further reexamined the evidence submitted at the hearing of this case in light of the "substantial impairment" test set forth in Commercial Code Section 2608. California Commercial Code Section 2711 provides that where the buyer justifiably revokes acceptance, the buyer may cancel the contract and in addition to recovering so much of the price as has been paid, the buyer may cover and have damages arising from the cover, or may recover damages for non-delivery, as provided in Commercial Code Sections 2713 and 2715. Section 2713 permits recovery of incidental damages and consequential damages as described in Section 2715. Although prior to its motion for reconsideration Helm had not sought revocation of acceptance and appropriate buyer's remedies under the

Commercial Code, the practical effect of these Commercial Code sections is very close to the relief sought by Helm in its request for rescission and damages.

Helm cites *U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 279 Cal.Rptr. 533 as support for the proposition that the failure of the paste line equipment to meet the run time and shut-down time parameters materially impaired the value of that equipment to Helm.

Helm invokes the *U.S. Roofing* idea that "perhaps the strongest evidence of the impairment of value" is the difference between the amount the equipment is originally sold for and the amount it brings at resale. However, this formulation assumes that there was a resale market, evidence for which was not presented. In light of the existing oversupply of tomatoes and tomato processing plants in California, such an assumption cannot be made in this case. Thus, the fact that the equipment has not been resold is of no help in determining whether there was a substantial impairment in the value of the paste processing equipment to Helm.

In *U.S. Roofing*, the "goods" that were the subject of the case consisted of a crane used in roofing commercial buildings. In finding that the plaintiff properly revoked acceptance of the crane, the court recited a number of evidentiary findings by the trial court, including that the crane was unstable so that it leaned against the building upon which it was working; the crane was "unsafe"; the crane had problems in lifting to its capacity; various structural members of the crane showed cracks and poor welds; and that there was a 25 mile an hour limit on its speed on any road surface other than a level grade. These factors led the court to conclude that the value of the crane to U.S. Roofing in its particular applications to U.S. Roofing's business was "substantially impaired." As further evidence, the court noted

that the crane was resold for $60,000, as against its original purchase price of $116,000.

In our case, Helm purchased equipment for a plant by which tomatoes were to be rendered into aseptic tomato paste. The tomato paste was to meet certain color, viscosity, freedom from extraneous material and asepticity standards, and was to be produced at the rate of 25,366 pounds per hour consistently over a 75 to 90-day tomato processing season. As an "adjunct" to producing aseptic tomato paste at this capacity, the processing equipment was to run for 10 to 12 days continuously, interrupted by shut-down times of two to three hours. The evidence supports the conclusion that the equipment would not run 10 to 12 days continuously, and that a shorter continuous run time was more likely. Further, the evidence supports the conclusion that the shut-down times would probably exceed three hours. It appears that all of the other specifications with respect to the equipment were either met, or in the case of the capacity warranty, were waived by Helm because no capacity testing was done, and because Helm prematurely barred Alfa from further adjustment of the tomato paste processing equipment.

The processing equipment running continuously for a shorter period of time and requiring a longer period of shut-down time than that specified in the Agreement does not in the Arbitrator's view "substantially impair" the value of the processing equipment to Helm. At most, failure of the lines of Contherm units to meet these time parameters will delay to some extent the processing of the tomatoes delivered to the plant.

If Mr. Westcott's testimony is credited, the delay calculated over the life span of the processing season amounts to little more than two to three days. Helm did not meet its burden of proving that such a delay would be an important factor in processing the tomatoes to be delivered to Helm by

growers under contract to Helm or in timely delivering finished paste to buyers. There is such an inherent flexibility in the length of the processing season that it is unlikely that two to three days difference in time to process tomatoes to paste over an entire season would "substantially impair" the value of the tomato processing equipment to Helm.

However, it is possible that the failure of the tomato processing equipment strictly to adhere to the run time and shut-down time parameters might render operation of the equipment more costly, and therefore entitle Helm to a credit on the amount due to Alfa on the Sale Agreement. Presumably, that evidence will be produced at the next hearing.

In conclusion, of significant import to the Arbitrator were the facts that the Helm plant was constructed with insufficient lead-time and no time within which to properly commission the plant; that no capacity tests were performed pursuant to the terms of the Sale Agreement; that Helm prematurely barred Alfa from the processing plant and prohibited further redesign or retooling of the processing equipment; that Helm failed to prove that the upstream equipment and utilities were adequate; and that independent economic and market conditions played a substantial role in Helm's decision to shut down the plant and sell it.

DATED: September 24, 1992.

/s/ JOHN E. PETERSON

John E. Peterson

TED R. FRAME #023736

LAW OFFICES OF
FRAME & MATSUMOTO
201 Washington Street
P.O. Box 895
Coalinga, CA 93201
Telephone: 209/935-1552
Facsimile: 209/935-1555

ATTORNEYS FOR: Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC., *Plaintiffs,* vs. ALFA-LAVAL FOOD & DAIRY CO., ALFA-LAVAL CREDIT AB, THOMAS W. HINCZ, W. STANLEY PRITCHARD, THOMAS BAILEY, and DOE 1 through DOE 20, inclusive, *Defendants.*	CASE NO. 425766-3 DECLARATION OF ROBERT GLASSMAN IN SUPPORT OF PETITION TO VACATE ARBITRATOR'S AWARD DATE: December 29, 1992 TIME: 9:30 a.m. DEPT: 1

STATE OF CALIFORNIA, COUNTY OF FRESNO:

I, ROBERT GLASSMAN, have personal knowledge of all facts stated in this declaration, and if called as a witness, could and would competently testify to them under oath.

I am Vice President and Chief Financial Officer of BRITZ, INC., HELM CONCENTRATES, INC. and HELM TOMATOES, INC., the plaintiffs herein. I reside in Fresno, California.

I was at the McCORMICK, BARSTOW offices, in Fresno, on October 29, 1991. I was there because my deposition was being taken there in the course of the BRITZ/ALFA-LAVAL arbitration proceedings. While I was there, I saw MARSHALL WHITNEY, a member of the McCORMICK, BARSTOW firm.

I had known MARSHALL WHITNEY for many years on both a personal and professional basis. He had represented me and some business associates in litigation in the Federal Court. Thus I naturally spoke with him at the McCORMICK, BARSTOW offices when I encountered him in the hallway during a break in the deposition proceedings. After exchanging pleasantries, MARSHALL inquired why I was in his offices, and I advised him I was attending depositions in the BRITZ/ALFA-LAVAL matter, in which his firm represented the opposing party, ALFA-LAVAL. He asked me who the arbitrator was. I told him that the arbitrator was JOHN PETERSON of JORY, PETERSON & SAGASER. I asked him what he thought of JOHN PETERSON. He told me that PETERSON was a good man or words to that effect. We had no further conversation on this subject until June 1992.

When I talked to MARSHALL WHITNEY on October 29, 1991, he did not say anything about referral of cases

by him to JOHN PETERSON or by McCORMICK, BARSTOW to JOHN PETERSON or to JOHN PETERSON's firm, and he did not allude in any manner whatsoever to any such referral relationship.

I placed a call to MARSHALL WHITNEY during the morning of June 22, 1992. I was in my office at 1338 W. Indianapolis Street, Fresno. He was not in his office, and I left a call-back message. He returned my call at approximately 1:15 p.m. the same day. I was not in my office when he returned the call. I called him back at approximately 4:00 p.m. the same day, and I talked with him at that time.

When WHITNEY answered my call at about 4:00 p.m. on Monday, June 22, 1992, he sounded like he was using a speaker phone. I asked him if he was using one. He said that he was, but that he was alone. He said that he was packing his briefcase to go out of town.

I told WHITNEY that JOHN PETERSON had ruled against us in the BRITZ/ALFA-LAVAL arbitration. He said, "You should have used me". I said, "I couldn't, you're on the other side". I then asked him if McCORMICK, BARSTOW referred cases to the JORY, PETERSON firm. He said that he had personally made two or three referrals to JOHN PETERSON recently, within the last year or two, and that PETERSON was a very good attorney. I thanked him for the information and hung up the phone. He did not tell me that in November-December, 1991, McCORMICK, BARSTOW had hired JOHN PETERSON as an expert witness.

Before my June 22, 1992 conversation with MARSHALL WHITNEY, I had no knowledge that McCORMICK, BARSTOW or attorneys in that firm referred cases to JORY, PETERSON or to attorneys in that firm.

Before I saw a copy of JOHN PETERSON's July 15, 1992, letter to the AMERICAN ARBITRATION ASSO-

CIATION (which I saw after July 15, 1992), I had no knowledge that JOHN PETERSON was serving as an expert witness for the McCORMICK, BARSTOW firm at the time of the arbitration hearing or at any other time.

I have read a copy of CRAIG WHITE's July 14, 1992 letter to RON McNAIR of the AMERICAN ARBITRATION ASSOCIATION. The statement by WHITE that in the fall of 1991, I had a phone conversation with MARSHALL WHITNEY wherein I asked him about JOHN PETERSON's reputation, and WHITNEY "alluded to the fact that he [PETERSON] was with a law firm which was one of several that McCORMICK, BARSTOW referred clients to in the event of a professional conflict of interest" is a false statement. I did not discuss JOHN PETERSON with MARSHALL WHITNEY, by telephone or in person, in the fall of 1991, or for that matter, at any other time before June 22, 1992, except as set forth above.

If I had known at the time when JOHN PETERSON was selected as arbitrator that PETERSON was on McCORMICK, BARSTOW's referral list, I would have objected to his being appointed as arbitrator, and if I had known at or before the beginning of the arbitration hearing that PETERSON was on McCORMICK, BARSTOW's referral list or that he was serving as an expert witness for McCORMICK, BARSTOW on other cases, I would have objected to his hearing our case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Fresno, California, December 8, 1992.

/s/ ROBERT GLASSMAN

Robert Glassman

[JORY, PETERSON & SAGASER LETTERHEAD]

RECEIVED
JUN 26 1992

June 25, 1992

Ted R. Frame, Esq.
FRAME & MATSUMOTO
201 Washington Street
Post Office Box 895
Coalinga, California 93210

Re: Alfa-Laval Food and Dairy Co. and Helm Concentrates, Inc., et al.
AAA Case No. 72199 2101 90

Dear Mr. Frame:

I have your letter of June 24, 1992, and I have these comments. As you know, and have known for some time, our firm limits its practice to commercial litigation and to labor relations from the management perspective. Over the years, we have and received referrals from many firms in Fresno County, the San Joaquin Valley and the State of California. In fact, you have kindly referred to us at least one case in which we billed significant fees.

There is no special relationship between me or our firm and the McCormick, Barstow firm. However, I am advised that we are on McCormick, Barstow's list of referral firms. We have received referrals from that firm in the past, and our firm has referred matters to that firm.

Although not strictly analogous, within the last six months, you began representation of a group of Mendota area water users of which one of my clients, Fordel, Inc., is a member, with our approval.

When I accepted the assignment of this arbitration, I believed, and I continue to believe, that the McCormick, Barstow firm would not be involved in the arbitration. I have seen nothing since then to change that perception. I do not know the present relationship, if any, between McCormick, Barstow and Alpha-Laval. I do know that the McCormick, Barstow attorney who was primarily responsible for the case, Ollie Wanger, is now a sitting federal judge.

Some of our firm's hardest fought, bitterest cases have been against the McCormick, Barstow firm. In fact, you may recall the *Gerawan* case involving plum tree defoliation in which you represented Britz Chemical and Mario Beltramo of McCormick, Barstow represented Chevron as Defendants, and I represented Gerawan as Plaintiff.

Without examining my files in detail, it is my estimate that our firm has had as many cases adversarial to McCormick, Barstow as it has referrals from that firm. In any event, it is inconceivable to me that any decision I might make in this case would be affected in the slightest by the fact that I am on McCormick, Barstow's referral list.

I have carefully read Rule 1606(a) of the California Rules of Court, and California Code of Civil Procedure Section 170.1. Neither of those sections compels or even suggests the disclosures you request in your June 24, 1992 letter, so I respectfully decline your request.

I understand your clients' concerns and the necessity for you to write as you did. However, please assure your clients that the fact that the McCormick, Barstow firm represented Alfa-Laval in the underlying Superior Court action has had absolutely no impact on my consideration of this case.

Further, I wish to assure Alfa-Laval that your having referred the La Cuesta Verde-Cassio case to me has likewise had no impact.

You are a capable and talented lawyer, and I look forward to working with you in the future.

Very truly yours,

/s/ JOHN E. PETERSON

John E. Peterson

JEP/cc

cc: Mr. Ron McNair
Craig White, Esq.

[JORY, PETERSON & SAGASER LETTERHEAD]

RECEIVED
JUL 10 1992

July 9, 1992

Mr. Ronald McNair
AMERICAN ARBITRATION ASSOCIATION
Post Office Box 57994
Los Angeles, California 90057-0994

Re: Alfa-Laval Food & Dairy Co. and
Helm Concentrates, Inc., et al.
AAA Case No. 72199 2101 90

Dear Mr. McNair:

I returned from vacation on July 6, 1992, and have now read the exchange of correspondence dated June 29, 1992, and after between Mr. Frame and Mr. White. I have these comments on Mr. Frame's letter of June 29, 1992.

I am aware of the cases he cites and of Rule 19 of the American Arbitration Association. In the past, when I have arbitrated a matter involving a party represented by the McCormick, Barstow firm, I have advised the American Arbitration Association that I have been on McCormick, Barstow's referral list. I would have done so in this case had I believed that McCormick, Barstow represented Alfa-Laval in the arbitration, or in any other capacity.

The June, 1991 motion for summary judgment provided no new information. I knew in April 1991 that McCormick,

Barstow had represented Alfa-Laval in the Superior Court action. To the best of my knowledge then, and since then, McCormick, Barstow was not to be, and was not, involved in the arbitration.

As to the May 20, 1991 inspection, my notes do *not* reflect the presence of an attorney from McCormick, Barstow, and to the best of my recollection, no such attorney was present.

Finally, as to the December 2, 1991 McCormick, Barstow letter about the deposition subpena, the writer, John T. Savrnoch, was unknown to me at the time, and remains unknown to me. Further, that letter reflects nothing more than a local accommodation of the Chicago-based Wildman, Harrold firm.

My reluctance to make the disclosures Mr. Frame requests arises from my belief that such disclosures are irrelevant, given my belief as to the lack of any relationship between Alfa-Laval and the McCormick, Barstow firm after the order was entered in Superior Court requiring arbitration. None of the communications from Mr. Frame, the Wildman, Harrold firm or the American Arbitration Association indicated the involvement of McCormick, Barstow in the arbitration, although I do recall an off-the-record suggestion that we use a McCormick, Barstow conference room for a day. If Alfa-Laval had an attorney-client relationship with McCormick, Barstow during the pendency of the arbitration, it was unknown to me. Mr. Savrnoch's December 2, 1991 letter did not, and does not, change that knowledge.

In any event, without in any way conceding the relevance of these disclosures, please be advised that I am aware of the following matters.

It is my understanding of the McCormick, Barstow referral list process that its attorneys provide at least three names

of lawyers to persons needing such referrals, so that the client can choose among a number of names. I am not aware of any client to whom McCormick, Barstow gave only my firm's name. (Our firm's file set-up system did not begin to reflect the source of a client until late Spring, 1992.)

I have been asked (1985 through 1991) to testify as an expert defense witness in legal malpractice actions against the Baker, Manock & Jensen firm in Fresno, the Lang, Richert & Patch firm and the Motschiedler, Michaelides & Wishon firm. All were represented by the McCormick, Barstow firm. I do not know whether I was the choice of the Defendant law firms or of McCormick, Barstow, or both, but the initial contacts came from McCormick, Barstow.

Further, as to specific cases of which I have personal knowledge that within the past three years McCormick, Barstow had provided our name, or opposed us, please be aware of the following:

(1) *Dwight Nelson v. John Mackie*

Dwight Nelson was referred to me in Spring, 1989, by direct contact from Marshall Whitney, a partner of McCormick, Barstow. This was a legal malpractice action which settled in March, 1992. Since then, Dwight Nelson has directed a number of litigation matters to our firm, which has caused some discomfort between me and Mr. Whitney.

(2) *Lindley v. U.S. Home, et al.*

Our firm represented Plaintiffs Lindley in this case, against, among others, U.S. Home, represented by McCormick, Barstow. The case recently settled for approximately $340,000.

(3) *Chassey v. Mutual of New York, et al.*

McCormick, Barstow represented Plaintiff and our firm represented Defendants in this wrongful termination case. In

April, 1992, a jury awarded Plaintiff $250,000 against the corporate Defendant.

(4) *Bishop v. Arrow Electronics*

McCormick, Barstow represented Plaintiff and our firm represented Defendant Arrow Electronics. A jury returned a verdict of $300,000 for Plaintiff in February, 1992.

(5) *Harter v. Chow*

Our firm represented Plaintiff John Harter, and McCormick, Barstow represented Defendant landlord. This case settled, after a rather vituperative deposition of Steve Rau, one of McCormick, Barstow's transactional lawyers. The case settled in 1991 very favorably to Harter.

(6) *City of Fresno v. Riverview Estates*

In one of the last cases handled by Ollie Wanger, now a Federal judge, McCormick, Barstow represented the City of Fresno against my client, Riverview Estates. The subject of the action was the City's allegation that my developer clients had attempted to defraud the City into accepting an 11 acre dump site as a park. This high profile case settled to the mutual benefit of the parties in the Summer of 1990.

(7) *First American Title*

I believe my name was mentioned by a McCormick, Barstow lawyer to First American Title Insurance Company involving a case in which McCormick, Barstow had a conflict of interest. Since then, First American has sent additional cases to us rather than to McCormick, Barstow.

(8) *Bank of Fresno*

Until two years ago, our firm did all of Bank of Fresno's litigation. At that time, McCormick, Barstow took over the regulatory representation from Pettitt & Martin, a San Francisco law firm, and acquired the litigation work with it.

To provide these disclosures I looked at our list of active matters, but I did not inquire of other lawyers in the firm as to their knowledge or recollection of matters involving McCormick, Barstow.

At no time has our law firm, or any attorney in our law firm, paid a referral fee to McCormick, Barstow, or received a referral fee from that firm. To reiterate, there is no relationship between our firm and McCormick, Barstow different from that between our firm and any other Fresno County firm, including Mr. Frame's firm.

As final notes, with respect to the Mendota water users, Mr. Frame's representation of my client in connection with that group was effectively my decision; and the *Cassio* case was not resolved until Spring, 1989.

To reiterate, the disclosures, Mr. Frame requests are extremely difficult, because we have no records which will tell us which cases came from the fact that we were on a list of a number of attorneys given by McCormick, Barstow to calling clients. Although it is not obvious to me how these disclosures are helpful to anyone, I have provided them so that Mr. Frame can be assured that his clients have received, and will continue to receive, fair and impartial consideration in this case.

Very truly yours,

/s/ JOHN E. PETERSON

John E. Peterson

JEP/jr

cc: Ted R. Frame, Esq.
Craig White, Esq.

[JORY, PETERSON & SAGASER LETTERHEAD]

RECEIVED
JUL 17 1992

July 15, 1992

Mr. Ron McNair
Case Administrator
AMERICAN ARBITRATION ASSOCIATION
Post Office Box 57994
Los Angeles, California 90057-0994

Re: Alfa-Laval Food and Dairy Co. and
Helm Concentrates, Inc., et al.
AAA Case No. 72199 2101 90

Dear Mr. McNair:

The purpose of this letter is to respond to Mr. Frame's of July 13, 1992, and to the concerns expressed in it.

In order to prepare this letter, I have personally spoken to each of the lawyers in our firm, and inquired as to referrals to, referrals from, and all other relationships between each lawyer and the McCormick, Barstow firm. My reason for not doing so in preparation of my letter of July 9 was my belief that I could not possibly be biased or prejudiced by information I did not possess. However, if it will help allay Mr. Frame's concerns, this information is provided to correspond to the labeled parts of Mr. Frame's letter.

A. To the best of our lawyers' current recollections, within the last three years, five matters have originated in

our office and have been received ultimately by the McCormick, Barstow firm, as follows:

(1) *Golden State Peterbilt*

This trucking firm was referred by Andrew Wright of the McCormick, Barstow firm to my partner, Howard A. Sagaser, for negotiation of a start up labor contract. Later, the company ran into financial difficulties, so Riley Walter of the McCormick, Barstow firm filed for bankruptcy protection.

(2) *Harris Farms — Urias*

The employer, Harris Farms, retained us to represent it in this wrongful termination action. Mr. Sagaser tendered defense to the client's insurance carrier, which accepted. The carrier then required that the case be transferred to Lowell Carruth of the McCormick, Barstow firm. The case is pending.

(3) *Cal West*

This client of ours was a defendant in a wrongful termination case which followed the same scenario as set forth above. It has been settled.

(4) Mr. Sagaser recalls that another case was treated similarly, and sent to Steve Cornwell. He does not recall the client or case name, but the case has been resolved.

(5) *John Brelsford*

Mr. Brelsford's company, Diversified Development, was a defendant in a commercial case and retained us to defend the company. However, Steve Rau of McCormick, Barstow is his transactional lawyer, so the case was ordered by the client to be transferred to McCormick, Barstow.

(6) *Tim Crough Construction*

This client was referred to Jay Jory by Steve Rau of the McCormick firm. When a conflict of interest arose with respect to a litigation matter involving one of our existing clients, the matter was referred back to Mr. Rau.

We believe that there may be other matters about which we were consulted but which we could not accept and which have found a home in the McCormick, Barstow firm. We follow a procedure similar to that of the McCormick, Barstow firm, in that we will include lawyers of that firm in the process of providing a number of names to clients or prospective clients in situations where we cannot accept the representation. However, it is up to the client or prospective client to make the contact with the McCormick, Barstow firm and the other firms mentioned by us and to make the choice of representation.

B. These are other matters involving the McCormick, Barstow firm recalled by our lawyers.

(1) *Stockdale Partners*

Eric Hansen and Russ Ryan worked on this matter referred by the McCormick, Barstow firm. Our representation has essentially concluded.

(2) *Miller v. Zurich, Bodine v. Fireman's Fund*

These insurance coverage disputes were referred to Mike Smith by Tim Jones of the McCormick, Barstow firm. One is a contingent fee case and the other was taken on an hourly basis.

(3) *Chrisman v. AT&T*

This matter was referred as a conflict matter by McCormick, Barstow. Our firm represents the plaintiff in this hazardous waste case. Mike Smith is the primary attorney from our firm involved.

(4) *Paul McClean—Pavelich*

Rick Docker of the McCormick firm referred this case to Don Franson and me. Mr. Franson is primarily responsible for the case, which involved defending the examination of a judgment debtor.

(5) *Ellis & Thomason v. Bonadelle*

Howard Sagaser represented plaintiff Ellis & Thomason in this case, in which Greg Durbin of McCormick, Barstow represented defendant, in a hotly contested dispute regarding real property. That matter has been settled.

(6) *Terranova Ranch*

Terranova Ranch, Mr. Sagaser's client, was sued in a case in which Lowell Carruth of the McCormick, Barstow firm represents plaintiff. That matter has been settled.

C. I was consulted and agreed to serve as an expert witness in these matters in which McCormick, Barstow represented attorney firms as legal malpractice defendants:

(1) *Forte v. Lang, Richert & Patch*

I was initially contacted in late 1984 or early 1985. I provided deposition testimony and trial testimony on behalf of defendants. The case resolved favorably to defendants in September 1985.

(2) *Bilveu v. Baker, Manock & Jensen*

Larry Wayte of McCormick, Barstow firm contacted me in about November 1991. I have reviewed the pertinent transcripts and documents in the case, and have provided an oral opinion to Mr. Wayte. If this matter goes to trial, I expect to testify.

(3) *Fansler v. Motschiedler, Michaelides & Wishon*

Marshall Whitney of the McCormick, Barstow firm contacted me in December 1991 regarding testimony in this

case. I have reviewed appropriate documents and transcripts, provided an oral opinion, and given deposition testimony. If this case goes to trial, I expect to testify.

D. No other attorney in our firm has been consulted as an expert by, or testified on behalf of, McCormick, Barstow clients.

E. Not having been party to the conversation to which Mr. Frame refers, it is difficult for me to respond. However, I am aware that Mr. Whitney mentioned our name, and others, as potential attorneys for plaintiffs' legal malpractice cases. Two of those potential plaintiffs contacted me, and I declined the representation. Both clients indicated that I was one of three different firms mentioned by Mr. Whitney. Further, Mr. Frame's letter prompted me to look at my list of inactive matters; and I was reminded that at Mr. Whitney's request, I provided a legal opinion to the members of the city council of Hanford regarding their personal exposure in connection with an attempt by GWF to construct a coal-powered co-generation plant in the City of Hanford. This file closed in March 1990.

The McCormick, Barstow firm has an excellent reputation in the San Joaquin Valley for litigation. When we cannot take a litigation matter because of a conflict of interest, that firm is consistently one of two or three firms the names of which we provide to clients or prospective clients seeking our services. However, we do not keep track of the number of times, or of the clients, in which, or to whom, we have provided McCormick, Barstow's name.

Although Mr. Frame did not request this information in his July 13 letter, I should disclose that when I discussed the McCormick, Barstow firm with my partner Mike Smith, he advised me that at some time in the Fall of 1991, Mr. Robert Glassman, one of the representatives of the Helm Group, hand-delivered a check drawn on Britz Chem-

ical payable to American Western Banker, for the benefit of one of our clients, Mr. Doug Maddox. I remember seeing Mr. Glassman at the time, but he and I did not speak. Mr. Smith saw no reason to advise me of the visit, nor of subsequent payments made by Britz Chemical into our trust account on behalf of Mr. Maddox, which Mr. Smith assumed were in the nature of loans to Mr. Maddox.

Further, my partner Howard Sagaser has informed me that Mr. Frame and our office share mutual clients such as Dick Hewitson and Phil Sagaser, who is Howard Sagaser's brother.

I can say with absolute certainty that none of the disclosures I have made in this letter or in my June 9, 1992 letter are relevant to my consideration of the law and facts in the Alfa-Laval/Helm case. These disclosures reflect the fact that I am known in the general legal community, and in the same legal and business circles as the McCormick, Barstow firm, and Mr. Frame's firm.

The remaining content of Mr. Frame's letter appears to consist of argument about the need for disclosure and about conclusions I have drawn from my observations during the course of arbitration of this case. Suffice it to say that I disagree with Mr. Frame's arguments, except to the extent reflected in my letters of June 25, July 9 and today.

In conclusion, we consider the McCormick, Barstow firm to be a major competitor in the arena of commercial litigation. We provide names of their attorneys as well as other firms in that context because we know the client referred will be well served. I believe that they feel similarly about us. Similar considerations have led me to mention Mr. Frame's name in connection with legal matters involving the west side of the San Joaquin Valley. I reiterate, however, that all of this is simply irrelevant to the Alfa-Helm arbitration.

I believe that at all times in this matter, I have acted in accordance with Cannon II of the Code of Ethics for arbitrators in commercial disputes. Quite frankly, I consider the interests and relationships indicated in my correspondence on this subject as trivial.

I look forward to further discussion of this matter with you at your convenience.

Very truly yours,

/s/ JOHN E. PETERSON
John E. Peterson

JEP/jr

cc: Ted R. Frame, Esq.
Craig M. White, Esq.

TED R. FRAME #023736
LAW OFFICES OF
FRAME & MATSUMOTO
201 Washington Street
P. O. Box 895
Coalinga, CA 93201
Telephone: 209/935-1552
Facsimile: 209/935-1555
ATTORNEYS FOR: Plaintiffs

FILED
APR 21 1993
FRESNO COUNTY CLERK
By _____
G.R.-DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

BRITZ, INC.,
HELM CONCENTRATES, INC., and
HELM TOMATOES, INC.,

Plaintiffs/Petitioners,

vs.

ALFA-LAVAL FOOD & DAIRY CO.,
ALFA-LAVAL CREDIT AB,
THOMAS W. HINCZ,
W. STANLEY PRITCHARD,
THOMAS BAILEY, and
DOE 1 through DOE 20, inclusive,

Defendants/Respondents.

CASE NO. 425766-3

SUPPLEMENTAL DECLARATION OF TED R. FRAME IN SUPPORT OF PETITION TO VACATE ARBITRATOR'S AWARD

DATE: May 28, 1993
TIME: 8:30 a.m.
DEPT: 7

STATE OF CALIFORNIA, COUNTY OF FRESNO:

I, TED R. FRAME, make the following declarations.

I am one of the attorneys for the plaintiffs.

I have firsthand knowledge of all of the facts stated in this declaration, and if called as a witness, I could and would competently testify to them under oath.

I have carefully examined each of the documents attached to this Declaration as an exhibit. Whenever I refer to an exhibit in this Declaration, I refer to those documents. Each of those documents is a document or a copy of a document sent or received by me. Each of them was sent or received by me in the ordinary course of business, and each of them, or the copies, as the case may be, has been in my possession or under my control since they were sent or received. The copies are true copies in each instance.

SUPPLEMENTAL CHRONOLOGY

Since the previous hearing in this matter, December 23, 1992, the following events have occurred:

1. A short time after the December 23, 1992, hearing in this Court, we filed a Petition for Writ of Mandate with the Court of Appeal, Fifth Appellate District. We did so on January 8, 1993, and on February 1, 1993, we requested a stay of the arbitration hearing scheduled for February 22, 1993. The ALFA-LAVAL parties filed responses. The Petition for the Writ and the request for the stay were denied by the Court of Appeal on February 11, 1993. Copies of the Court of Appeal filings are on file in this Court, and this Court is requested to take judicial notice of them. McCORMICK, BARSTOW and WILDMAN, HAROLD appear as co-counsel for the ALFA-LAVAL parties in all of those filings.

2. On January 28, 1993, we requested the arbitrator to continue until a later date the arbitration hearing scheduled for February 22, 1993, and on the same date, the arbitrator refused to do so. (Exhibits "A" and "B").

3. On February 4, 1993, we requested the AMERICAN ARBITRATION ASSOCIATION to reconsider its previous refusal to remove the arbitrator. We did so through associate counsel in Los Angeles. (Exhibit "C"). On February 18, 1993, the AMERICAN ARBITRATION ASSOCIATION again refused to remove the arbitrator. (Exhibit "D").

4. On February 17, 1993, I requested the arbitrator to update his July, 1992, disclosures. I did so by facsimile to the arbitrator. (Exhibit "E").

5. The arbitrator responded by facsimile the same day. (Exhibit "F"). In his response he states that his firm no longer is performing services in the *Stockdale Partners* case or the *Bodine v. Fireman's Fund* case, but that his firm continues to perform services in the *Miller v. Zurich* case, the *Chrisman v. AT & T* case, and the *McLean - Pavolich* case. He also states that his July, 1992, disclosure was incomplete: Another case, *Pitman v. Amco*, was referred to his firm by McCORMICK, BARSTOW in April, 1992. The referral was a personal referral, by GREG DURBIN of McCORMICK, BARSTOW.

6. The arbitrator attaches to his February 17, 1993 response (Exhibit "F") a copy set of his invoices to McCORMICK, BARSTOW for his employment by McCORMICK, BARSTOW as an expert witness during the pendency of the arbitration.

7. On February 19, 1993, I responded to the arbitrator's February 17, 1993, facsimile to me. (Exhibit "G"). I requested the arbitrator to recuse himself. He did not do so.

8. The second phase of the arbitration (the damages phase) was heard by the arbitrator, JOHN PETERSON, February 22, 1993, through February 25, 1993.

FULLERTON, LANG law firm. I had no part in his selection, I did not confer with him before or after he was selected, and to the best of my recollection, I was not present when he testified.

d. For the foregoing reasons, I did not have in mind at the time of PETERSON's selection as the arbitrator herein, or at the time of the January, 1992, hearings, or subsequently until his July, 1992, disclosures, that he had testified for McCORMICK, BARSTOW in 1985; and before July, 1992, I had no indication, no inkling, or no knowledge that he would be hired or was hired by McCORMICK, BARSTOW in November of 1991 and again in December 1991.

I declare under penalty of perjury that the foregoing is true and correct.

9. On March 16, 1993, the AMERICAN ARBITRATION ASSOCIATION notified the arbitrator that the Final Award was due on or before April 15, 1993. (Exhibit "H").

10. On or about March 30, 1993, McCORMICK, BARSTOW filed herein an Application for Pro Hac Vica appearances by CRAIG M. WHITE and THOMAS J. VERTICCHIO. The application has a hearing date of April 26, 1993.

11. On April, 8, 1993, we received from the AMERICAN ARBITRATION ASSOCIATION a copy of the arbitrator's Final Award. (Exhibit "I").

12. On April 19, 1993, we objected, by letter to the AMERICAN ARBITRATION ASSOCIATION, to the issuance by the arbitrator of any supplemental award for attorneys' fees and costs of suit. (Exhibit "J").

RELATED MATTERS

1. Attached hereto, marked Exhibit "K", and by reference incorporated herein, is the Notice of Taking Deposition of Ray Medeiros, with attached Deposition Subpena. Both are dated November 7, 1991, both were issued by McCORMICK, BARSTOW, and both were for use in the January, 1992, arbitration hearing. (The Superior Court action had been stayed). Numerous other subpenas for depositions and documents for use in the arbitration also were issued by McCORMICK, BARSTOW. Copies for some of them are attached hereto as Exhibits "L", "M", "N", "O", and "P", and by reference they are incorporated herein.

2. A copy of the December 2, 1991, letter from the arbitrator to McCORMICK, BARSTOW, a more legible copy than the one previously submitted, is attached hereto as Exhibit "Q". A copy of the arbitrator's response, dated December 6, 1991, is included for convenient reference.

3. When I appeared at the previous hearing herein, December 23, 1992, the petitioners herein were represented by STEPHEN CORNWELL of McCORMICK, BARSTOW. CRAIG WHITE, of WILDMAN, HAROLD, also was present. CORNWELL, during his closing argument, stated that I knew that McCORMICK, BARSTOW had hired the arbitrator herein, JOHN PETERSON, to testify as an expert witness in a Superior Court case in 1985.

The case referred to by CORNWELL was a case entitled *Forte v. Fullerton, Lang, Richert & Patch,* et al. The circumstances were the following ones:

a. The plaintiff in the case, EUGENE FORTE, was suing the FULLERTON, LANG firm for malicious prosecution and was suing its former clients, HENRY MIKAMI and FRANK UYESAKA, for fraud and other assorted causes of action. LAWRENCE WAYTE of McCOR-

MICK, BARSTOW represented the FULLERTON, LANG law firm. I represented MIKAMI and UYESAKA.

b. Because of the trial, which started in May, 1985, was a relatively long one, because my office was (and still is) a small one (at that time me and an associate, TOM ALLEN), and because MIKAMI and UYESAKA had limited financial resources, I was not present during the entire trial. During the phases of trial which affected the FULLERTON, LANG law firm and did not affect MIKAMI and UYESAKA, my associate, TOM ALLEN, was present, and I was not.

c. JOHN PETERSON was engaged by McCORMICK, BARSTOW to testify as an expert witness regarding the claims against the Executed at Coalinga, California, April 19, 1993.

/s/ TED R. FRAME
Ted R. Frame

[FRAME & MATSUMOTO LETTERHEAD]

EXPRESS MAIL
FAXED 213-386-2251

July 21, 1992

Mr. Ron McNair
Case Administrator
American Arbitration Association
P.O. Box 57994
Los Angeles, CA 90020-0994

RE: 72199 2101 90
Alfa-Laval Food & Dairy Co., a Division of
Alfa-Laval, Inc.
-and-
Helm Concentrates, Inc., Britz, Inc., &
Helm Tomatoes, Inc.

Dear Mr. McNair:

We have received a copy of the Arbitrator's July 15, 1992 letter to you. After reflecting on the contents of the letter, and for the following reasons, we object to the continued service of the Arbitrator. For the same reasons we respectively suggest to the Arbitrator that he grant our clients' pending Request for Reconsideration, solely for the purpose of vacating his Interim Award so that the liability phase of the arbitration can be reheard *de novo* by a new arbitrator. I believe that ethical considerations require him to do so.

Employment as Expert Witness.

The most telling reason for disqualifying the Arbitrator and for vacating his Interim Award is his having performed

services for the McCormick, Barstow firm during the pendency of the Arbitration. Please note,

a. The McCormick, Barstow firm represents Alfa-Laval in the Superior Court action in which the pending arbitration was ordered. When a final award is made in the pending arbitration, the award will be confirmed or vacated in the Superior Court action. Also, the Superior Court action is not dormant. The Superior Court conducts Status Conferences, monthly or nearly so, monitoring the status of the arbitration, and requires the parties to file written status statements.

b. The Arbitrator in the pending arbitration was appointed in January, 1991. The arbitration hearing (liability phase) was in January, 1992.

c. The Arbitrator, in the second paragraph of the first page of his July 9, 1992 letter to you, states that he would have advised the AAA that he was on McCormick, Barstow's referral list "had I believed that McCormick, Barstow represented Alfa-Laval in the arbitration, *or in any other capacity*". (Emphasis is ours).

d. The Arbitrator, in the third paragraph on the first page of his July 9, 1992 letter to you, states that he has been aware since April, 1991 that McCormick, Barstow represents Alfa-Laval in the Superior Court Action.

e. In December, 1991, McCormick, Barstow actively represented Alfa-Laval in a disputed discovery motion in the arbitration. (Please see the fifth paragraph of my July 15, 1992 letter to you).

f. In November, 1991, the Arbitrator accepted an assignment from McCormick, Barstow as an expert witness in a case being handled by McCormick, Barstow. The case was the *Bilyeu v. Baker, Manock & Jensen* case.

The case was disclosed by the Arbitrator on page 4 on his July 15, 1992 letter to you.

g. In December, 1991, the Arbitrator accepted an assignment for McCormick, Barstow as an expert witness in another case being handled by McCormick, Barstow. The case is the *Fansler v. Motschiedlar, Michaelides & Wishon* case. The case was disclosed by the Arbitrator on page 4 on his July 15, 1992 letter to you.

h. The Arbitrator states in his July 15 letter to you that he has given deposition testimony in the *Fansler* case. The plaintiff in the case is represented by Attorney Richard C. Crossman of Parichan, Renberg, Crossman & Harvey, 2350 W. Shaw Avenue, Suite 130, P.O. Box 9950, Fresno, California 93794, telephone 209/431-6300. I talked with Crossman after receiving the Arbitrator's July 15 letter. Crossman told me that the date of the deposition was February 24, 1992. At that time, while the Arbitrator was testifying as McCormick, Barstow's expert, the Arbitrator was awaiting receipt of the parties' opening briefs in the pending arbitration.

Rule 19 of the AAA Commercial Arbitration rules states that any person who is appointed as neutral arbitrator shall disclose "any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration *or any past or present relationship with the parties or their representatives*". (Emphasis is ours). "Representatives" is a broad term, and the Rule does not limit or qualify the term's meaning.

Cannon I(d) of the *Code of Ethics for Arbitrators in Commercial Disputes* states,

"After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship,

or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest."

Cannon II states,

"A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration; (2) Any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving members of their families or their current employers, partners or business associates.

B. Persons who are requested to accept appointment as arbitrators should make every reasonable effort to inform themselves of any interests or relationships described in Paragraph A above."

Upon accepting the expert witness assignments, the Arbitrator began to perform services for attorneys for a party to the arbitration. He did not disclose the assignment. There is no contention, and there cannot possibly be one, that our clients or we were aware of the assignments. Both assign-

ments occurred within two months of the commencement of the arbitration hearings.

In *Wheeler v. Saint Joseph Hospital* (California Court of Appeal, 1976) 63 CA3d 345, 369-372, and 379-380, the plaintiff's action, a medical malpractice action, named as defendants a hospital and two doctors. The action was filed in the Superior Court. Subsequently, the Superior Court made an order compelling arbitration. The arbitration was conducted pursuant to the Rules of the AAA, by an arbitration panel composed of a medical doctor, a lawyer, and a businessman. The doctor, Dr. H. L. Elmquist, was designated as the medical member of the panel. The arbitration hearings were held from December 9 through December 12, 1974, and from April 21 to April 25, 1975.

One of the *Wheeler* doctor defendants was represented in the Superior Court proceedings and in the arbitration proceedings by Attorney David Ruston of the law firm of Ruston & Nance. Unbeknown to David Ruston, Dr. Elmquist accepted an expert witness assignment from Ruston & Nance on November 27, 1974, in another, unrelated Superior Court case, and testified as an expert witness in that case on December 18, 1974. Neither Dr. Elmquist nor Attorney Ruston disclosed Elmquist's expert witness assignment. Attorney Ruston later explained that the occurrence "was simply the result of one member of a large firm not being aware of what another member was doing in an unrelated case". (63 CA3d 345, at 370).

The arbitration award was in favor of Attorney Ruston's client. The Court of Appeal vacated the award. The majority opinion by Justice Tamura states,

> "We conclude that the award should have been vacated by reason of Dr. Elmquist's failure to reveal to the parties his relationship with the firm of Ruston & Nance. We hasten to add that we do not imply that Dr. Elmquist was

guilty of any wrongdoing or that he was in fact biased or influenced by reason of the relationship. Nevertheless, as Justice Black emphasized in *Commonwealth*, such relationships must be disclosed to the parties if the integrity and effectiveness of the arbitration process is to be preserved."

A concurring opinion by Presiding Justice Gardner states,

> "I agree with the majority that neither Mr. Ruston nor Dr. Elmquist intentionally did anything wrong. I am positive that Mr. Ruston did not even know of Dr. Elmquist's retention by his firm in an unrelated lawsuit. I share Mr. Ruston's distress at the unprovoked and unrestrained attack made upon his professional integrity by opposing counsel. It was completely unnecessary and cannot be excused as advocate zeal. I am just as positive that it never entered Dr. Elmquist's mind that he was doing anything wrong. As the United States Supreme Court pointed out in *Commonwealth Corp. v. Casualty Co.* 393 U.S. 145 [21 L.Ed.2d 301, 89 S.Ct. 337], arbitrators cannot be expected to sever all their ties with the business world since they do not receive all their income from deciding cases. Dr. Elmquist is apparently a professional medical witness, not a lawyer or a judge, and probably thought nothing at all of accepting an assignment from Mr. Ruston's office while acting as an arbitrator in this case. Nevertheless, it happened and with or without *Commonwealth* or *Johnson v. Security Ins. Co.*, 6 Cal.App. 389 [86 Cal.Rptr. 133], the facts create an impression of possible bias and the award must be set aside. Litigants are prone to paranoia. Judges (and many arbitrators, too) live an uneasy life because of this.

> We not only must avoid evil, we must avoid the appearance of evil."

The facts in *Wheeler* and the pending arbitration differ because McCormick, Barstow did not represent Alfa-Laval at the arbitration hearing, but the rationale is the same because of McCormick, Barstow's continued interest in the outcome of the arbitration.

In the pending arbitration, the Arbitrator, at the time of the arbitration hearing, was employed by the attorneys for one of the parties. The conflict of interest is clearly delineated.

Referrals

The Arbitrator continues to fail to fully disclose referral information. In his July 15 letter to you he supplements his previous disclosure. He says that all of the referrals incurred "within the last three years" but for the most part he fails to say when during the three years. Also, we requested disclosure for a three-year period preceding the appointment of the Arbitrator and for the period since the appointment, not merely for the "last three years". Nevertheless, the number of referrals disclosed is impressive.

In the Arbitrator's July 9 letter to you, he discloses two referrals to his firm by McCormick, Barstow during the past three years, the *Dwight Nelson v. John Mackie* case and the *First American Title* case. In the Arbitrator's July 15 letter to you, he discloses eight referrals by name, *Golden State Peterbilt, Tim Crough Construction, Stockdale Partners, Miller v Zurich, Bodine v. Fireman's Fund, Christman v. AT & T, Paul McLean-Pavelich*, and the *City of Hanford* opinion, and he discloses two additional, unnamed referrals which he says he declined to accept. The total is twelve.

The Arbitrator's July 15 letter also discloses referrals to McCormick, Barstow.

The course of dealing between the Jory, Peterson firm and the McCormick, Barstow firm is a substantial business relationship between them. For Jory, Peterson, the relationship is a valuable one. Concededly the two firms also have an adversarial relationship, but the adversarial relationship is not the point here. The point here is the failure to disclose the referral relationship, the "I scratch your back and you scratch mine" relationship.

I realize that Alfa-Laval contends that Robert Glassman, one of Helm's principals, was told by Marshal Whitney of the McCormick, Barstow firm in the fall of 1991 that McCormick, Barstow referred cases to Jory, Peterson. Craig White in his July 14, 1992 letter to you, states that Whitney "confirmed Mr. Peterson's fine reputation and alluded to the fact that he was with a law firm which was one of several that McCormick, Barstow referred clients to in the event of a professional conflict of interest". (White's July 14 letter, second paragraph on page 2). I don't know what "alluded" means. Glassman denies that the conversation occurred. Even if it occurred, there is no contention by White that Whitney's allusion was anything more than a passing comment without any quantification.

In the seminal California case of *Johnston v. Security Ins. Co.* 1970) 6 CA3d 839, a witness in the arbitration was working on a case referred to the witness by the arbitrator at the time of the arbitration hearing. Here, in the pending arbitration, *Alfa-Laval v. Helm*, the Arbitrator's firm was working on cases referred to the Arbitrator's firm by attorneys for *Alfa-Laval* at the time of the arbitration hearing. See, for instance, the Arbitrator's description of the *Miller v. Zurich*, *Bodine v. Firemans Fund*, *Christman v. AT & T*, and *Paul McLean-Pavelich* cases, in the Arbitrator's July 15 letter to you.

In *Johnston*, the award is vacated. In doing so, the California Court of Appeal quotes Justice Hugo Black,

speaking for the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.* (1968) 393 U.S. 145, at 148-149,

> "It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work regarding cases, but *we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.* We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that *arbitrators disclose to the parties any dealings that might create an impression of possible bias.*" (Emphasis is the *Johnston* Court's).

Conclusion

The Arbitrator states in the final paragraph of his July 15 letter to you that, "I consider the interests and relationships indicated in my correspondence on this subject as trivial". We respectfully submit that although the Arbitrator is well-intentioned, he misses the issue. The issue is that he failed to disclose matters he should have disclosed. He should have disclosed those matters so that the parties, not he, could have concluded whether those matters were significant. His failure to do so disqualifies him.

Yours very truly,

/s/ RUSSELL MATSUMOTO, for
Ted R. Frame

TRF:dlc
cc: John E. Peterson, Esq. (Fax/mail)
Craig White, Esq. (Fax/mail)
McCormick, Barstow, Sheppard,
Wayte & Carruth (mail)
Clients (mail)

RECEIVED
AUGUST 5, 1992

August 4, 1992

72 T199 2101 90 RM
Alfa-Laval Food and Dairy Co.,
A Div. Of Alfa-Laval, Inc.
-and-
Heim Concentrates, Inc.,
Britz, Inc., &
Helm Tomatoes, Inc.
AAA Rules: Commercial

Craig White Michael Dockterman
& Daniel Kaplan Attorneys
for Alfa-Laval Food & Diary Co
Wildman Harrold Allan & Dixon
225 West Wacker Dr #3000
Chicago, IL 60606

Ted R Frame Attorney
for Helm Concentrates etc
Frame & Matsumoto
P O Box 895
Coalinga, CA 93210

Dear Parties:

The Association has received and reviewed the parties various correspondence concerning the disclosure issue of the Arbitrator raised by Attorney Frame. We have also received the latest correspondence of Attorney White dated July 31, 1992.

Upon careful review by the Association and in accordance with Section 19 of the Commercial Arbitration Rules, it is the determination of the Administrator that the challenge submitted by Respondent to the Arbitrator's continued service be denied and Arbitrator John E. Peterson's appoint-

ment and continued service on the above-captioned matter is reaffirmed.

Sincerely,

/s/ ROCCO M SCANZA

Rocco M. Scanza
Assistant Regional Director
RMS/ct

Encl.

cc: John E. Peterson, Esq.

[COTKIN & COLLINS LETTERHEAD]

Received
Feb 8 1993

February 4, 1993

Mr. Rocco M. Scanza, Regional Director
AMERICAN ARBITRATION ASSOCIATION
3055 Wilshire Boulevard, 7th Floor
Los Angeles, California 90010-1108

Re: REQUEST FOR RECONSIDERATION
Arbitration No.: 72-199210190
Alfa-Laval Food and Dairy Company, A Division of Alfa-Laval, Inc. and Helm Concentrates, Inc., Britz, Inc. and Helm Tomatoes, Inc.
Our File No. : 212140011

Dear Mr. Scanza:

We have been engaged in the above-referenced matter as associate counsel with Ted R. Frame of the law firm of Frame & Matsumoto for Helm Concentrates, Inc., Britz, Inc. and Helm Tomatoes, Inc., and, in that capacity, herewith request a reconsideration of the Administrator's August 4, 1992 determination to deny Respondent's challenge to the Arbitrator's continued service and to reaffirm the appointment and continued service of Arbitrator John E. Peterson.

The reason for this Request for Reconsideration is that, upon our independent analysis, in view of the facts and circumstances, it is our belief that the original determination by the Administrator under the American Arbitration Association ("AAA") Commercial Rules was incorrect.[1] There have been further developments as well supporting the

[1]This firm has represented the Helm parties in an ongoing Federal District Court matter involving an insurance dispute relating to losses at the Helm facility.

Respondent's initial objection to the appointment and continued service of Mr. Peterson.

As reflected in the prior materials submitted to the Administrator, in the above-referenced arbitration the attorneys for Alfa-Laval Food and Dairy Company, A Division of Alfa-Laval, Inc. ("Alfa-Laval") are both the Wildman, Harrold, Allen & Dixon firm ("Wildman, Harrold"), as well as the prominent Fresno law firm of McCormick, Barstow, Sheppard, Wayte & Carruth ("McCormick, Barstow"). The genesis of the above-referenced arbitration is as follows:

On or about September 14, 1990, plaintiffs Britz, Inc., Helm Concentrates, Inc. and Helm Tomatoes, Inc. filed a forty million dollar lawsuit against Alfa-Laval Food and Dairy Company, Alfa-Laval Credit AB (a related company) and two Alfa-Laval employees, Thomas W. Hincz and W. Stanley Pritchard, in the Superior Court of California, County of Fresno, Case No. 4257663, seeking money damages suffered as a result of alleged breach of contract, fraud, negligent misrepresentation, and other causes of action regarding certain equipment and services furnished under several contracts by Alfa-Laval for the operation of a tomato processing plant owned and operated by plaintiffs.

In response, Alfa-Laval, by and through its counsel, McCormick, Barstow, requested the court to compel arbitration and also requested the court to stay the suit pending completion of the arbitration. The court did order the matter into arbitration and stayed the proceedings on November 29, 1990.

After the filing of the September 14, 1990 lawsuit in Superior Court, but prior to obtaining the order for stay, Alfa-Laval's Chicago attorneys, Wildman, Harrold, filed a Demand for Arbitration on October 10, 1990, pursuant to the relevant equipment and services contracts, which were the same contracts in dispute in the September 14, 1990

court action. The Helm/Britz Companies responded and counterclaimed.

Pursuant to the Fresno Superior Court's order compelling arbitration and staying the Superior Court action, the parties proceeded to arbitration before the AAA, by and through the regional office in Los Angeles which has jurisdiction over Fresno, California, where the parties agreed the arbitration would take place. As the Administrator can see, from the outset of this action, the Alfa-Laval parties were represented by two law firms, the Chicago firm of Wildman, Harrold and the Fresno firm of McCormick, Barstow. In January 1991, Mr. Peterson was jointly selected as Arbitrator by Wildman, Harrold after consultation with McCormick, Barstow, and by Mr. Frame.

For about a year prior to the commencement of the evidentiary hearing in January of 1992, the parties proceeded with substantial pre-arbitration discovery. Many of the depositions took place in the McCormick, Barstow law offices and certain discovery matters were handled directly by McCormick, Barstow.

In particular, and most importantly, John T. Savrnoch of McCormick, Barstow directly communicated with Mr. Peterson on December 2, 1991 on behalf of Alfa-Laval in regard to securing a subpoena to compel a third party to produce documents. On December 6, 1991, Mr. Peterson responded, in due course, to Mr. Savrnoch granting McCormick, Barstow's request for a subpoena and copied his response to the Wildman, Harrold firm, to Mr. Frame, to the law firm for the third party from whom the documents were compelled and to the AAA Administrator, Ron McNair. THE IMPORTANCE OF THIS COMMUNICATION IS THAT IT ESTABLISHES, BEYOND ANY CONCEIVABLE DOUBT, THAT MR. PETERSON KNEW THAT THE ALFA-LAVAL PARTIES WERE REPRESENTED BY TWO FIRMS — THE PROMI-

NENT FRESNO FIRM OF McCORMICK, BARSTOW AND THE CHICAGO FIRM OF WILDMAN, HARROLD AS EARLY AS DECEMBER 1991.

During the course of the evidentiary hearing which took place in January of 1992, Alfa-Laval, was represented by individuals from the Wildman, Harrold firm, and the McCormick, Barstow firm apparently took a backseat, their client evidently having determined that it was not necessary to have two firms present during the arbitration evidentiary hearings. Nevertheless, it is obvious that the Wildman, Harrold firm, a Chicago firm, which never sought admission "pro hac vice", was co-counseling with the local McCormick, Barstow firm throughout the arbitration proceedings.

After conclusion of the evidentiary hearing on or about May 22, 1992, Mr. Peterson served his Interim Award as to liability only, essentially finding in favor of Alfa-Laval.

It is, of course, not unusual for firms to refer matters to and from each other, and that is a matter of common knowledge. In 1985, for example, Mr. Frame represented parties in a matter in which McCormick, Barstow hired Mr. Peterson to be an expert witness. Of course, Mr. Frame could not have known and did *not* know that six years later, during *this* arbitration, McCormick, Barstow again hired Mr. Peterson as an expert in two matters in November and December of 1991.

It was not until June of 1992 that the Helm/Britz parties learned for the first time that Mr. Peterson may have had a *continuing* business relationship with McCormick, Barstow of some nature. It was for that reason that they had commenced to correspond directly with the Arbitrator to request him to disclose the nature and extent of any *continuing* business relationship.

It is remarkable that Mr. Peterson did not, on his own initiative, comply with the AAA Commercial Arbitration

Rules, Rule 19, nor with Canon II of the Code of Ethics for Arbitrators in Commercial Disputes, requiring disclosure of any prior or continuing business relationship with counsel for one of the parties. The AAA requests that every neutral arbitrator, *upon appointment,* sign a disclosure statement that reads:

> "It is most important that the parties have a complete confidence in the arbitrator's impartiality. Therefore, please disclose any past or present relationship with the parties or their counsel, direct or indirect, whether financial, professional, social, or of any other kind. *If any relationship arises during the course of the arbitration* or if there is any change at any time in the biographical information you have provided to the AAA, *it must also be disclosed. Any doubts should be resolved in favor of the disclosure.* If you are aware of such a relationship, please describe it below. The AAA will call the facts to the attention of the parties' counsel." (Emphasis added.)

At no time prior to July of 1992 did Mr. Peterson make the required disclosure. The July 1992 disclosures were extraordinarily significant.

As noted above, it was in January of 1991 that Mr. Peterson was appointed Arbitrator. It was in January of 1992 that Mr. Peterson conducted an evidentiary hearing that led to the May 1992 Interim Award.

However, on or after receiving McCormick, Barstow's December 2, 1991 letter, on December 6, 1991, exactly one month prior to the commencement of the evidentiary hearing, Mr. Peterson prepared a written response to John T. Savrnoch, Esq. of the McCormick, Barstow firm, acknowledging receipt of Mr. Savrnoch's December 2, 1991 letter requesting issuance of a deposition subpoena for the production of documents by a third party, and ruled on that request agreeing to issue the subpoena as requested by Alfa-Laval,

by and through its counsel, McCormick, Barstow. Attached to this request for reconsideration are copies of the McCormick, Barstow December 2, 1991 correspondence and Mr. Peterson's December 6, 1991 correspondence for your review.

In July 1992, Mr. Peterson revealed for the first time that not only were there six cases, *which at the time of the arbitration hearing* the arbitrator or his firm were representing clients referred to them by McCormick, Barstow, there were two other particularly significant matters *which began within sixty (60) days of the arbitration hearing and continued during and after it, probably to the present.* The other matters were as follows:

(1) In *Bilyeu v. Baker, Manock & Jensen,* Mr. Peterson was engaged by the McCormick, Barstow firm beginning in November 1991 and continuously thereafter as an expert witness; and

(2) In *Fansler v. Motschiedler, Michaelides & Wishon,* McCormick, Barstow contacted Mr. Peterson in December of 1991 and engaged him as an expert witness, and he continued in that capacity thereafter and gave an oral opinion, and in February 1992, a deposition testimony.

Please note that within the same month (December 1991) that Mr. Peterson responded favorably to McCormick, Barstow's discovery request on behalf of Alfa-Laval, Mr. Peterson was engaged *not once but twice as an expert witness for McCormick, Barstow,* counsel for one of the parties, Alfa-Laval! Neither of these two events could be professionally insignificant to Mr. Peterson. Direct engagement as an expert witness by the most prominent law firm in Fresno is a coveted accomplishment. Presiding over a forty million dollar arbitration is an opportunity few attorneys ever experience.

Perhaps the confluence of these two events temporarily blinded Mr. Peterson to his ethical obligations of disclosure. In any case, Mr. Peterson ceased qualifying as a neutral arbitrator when he accepted the November-December 1991 engagements from McCormick, Barstow.[2]

Mr. Peterson has declined Mr. Frame's request for a continuance of the damages hearing scheduled for February 22, 1993. Thus, we must ask for an immediate review and reconsideration by the Administrator.

For the Administrator's information, the additional evidence we would like to bring before the Administrator is simply the first page of the response brief filed by Alfa-Laval with the Court of Appeal in this matter. Having failed to secure the Administrator's assistance in this matter, Mr. Frame filed a Petition to Vacate the Interim Award, on the basis of arbitral bias which petition was opposed by McCormick, Barstow and Wildman, Harrold on behalf of Alfa-Laval.

The opposition filed by Alfa-Laval essentially argued that the Interim Award was interlocutory and that it was premature to attack the award on the basis of arbitral bias or on any other basis. The Superior Court ruled in favor of Alfa-Laval on the question of the timeliness of the Petition to Vacate, and Mr. Frame thereafter filed a Petition for Writ of Mandate with the Appellate Court. On or about January 21, 1993 the Court of Appeal, Fifth Appellate District, re-

---

[2]We believe that even before accepting the experting assignments, Mr. Peterson was obligated to disclose the other business dealings with McCormick, Barstow. However, due to Mr. Peterson's direct and continuing employment by counsel for Alfa-Laval, there is no need to belabor the point that Mr. Peterson does not qualify as a neutral arbitrator and must be removed. Remarkably, Mr. Peterson gave an expert deposition in February of 1992 in the *Fansler* matter while Mr. Peterson was preparing the initial Interim Award. Please see the declaration of Richard C. Crossman attached hereto.

quested a response to the Petition for Writ of Mandate with particular concern with regard to whether the Superior Court has jurisdiction to intervene prior to the rendition of a final award.[3]

Alfa-Laval filed the requested opposition, and we enclose for your review the cover of the opposition which supports the Respondent's objection to the appointment and continued service of Mr. Peterson. The brief filed by Alfa-Laval demonstrates beyond any possible doubt that Alfa-Laval is represented in this matter by two sets of attorneys, the Chicago firm of Wildman, Harrold and the Fresno law firm of McCormick, Barstow.

There simply can be no doubt that these are the facts and have been since prior to the commencement of the arbitration proceedings. There can also be no doubt that Mr. Peterson was personally informed of these facts, and that Mr. Peterson failed to comply with Commercial Arbitration Rules of the AAA in that he failed to disclose his prior and ongoing business relationship with counsel for one of the parties.

Finally, in November of 1991, and continuously thereafter, under the Commercial Arbitration Rules and the Code of Ethics, Mr. Peterson ceased being a qualified neutral arbitrator (even assuming Mr. Peterson was qualified prior to that time).

On these bases therefore, we respectfully request that the Administrator immediately reconsider the initial objection by Respondent to the appointment and continued service of Mr. Peterson. If you deem it appropriate, we would be pleased to attend a hearing on this issue to further articulate our position on this matter.

---

[3]In addition, the Britz/Helm parties have requested a stay of the arbitration proceedings from the Court of Appeal. The Appellate Court has not yet addressed the request for stay.

Thank you for your consideration of this matter, and we look forward to hearing from you shortly. If we can provide any further or additional information, please do not hesitate to contact this office.

Very truly yours,

COTKIN & COLLINS

BY: /s/ JOAN M. DOLINSKY
Raphael Cotkin
Joan M. Dolinsky

JMD:nmk
Enclosures

cc: (w/enclosures)

Ted R. Frame, Esq.
FRAME & MATSUMOTO

Craig M. White, Esq.
WILDMAN, HARROLD, ALLEN & DIXON

Stephen R. Cornwell, Esq.
McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH

John E. Peterson, Esq.
JORY, PETERSON & SAGASER

[AMERICAN ARBITRATION ASSOCIATION LETTERHEAD]

February 18, 1993

72 T199 2101 90
Alfa-Laval Food And Dairy Co.,
A Div. Of Alfa-Laval, Inc.
-and-
Helm Concentrates, Inc., Britz, Inc., & Helm Tomatoes, Inc.

AAA Rules: Commercial

VIA FAX

Craig White Michael Dockterman
& Daniel Kaplan Attorneys
for Alfa-Laval Food & Dairy Co.
Wildman Harrold Allan & Dixon
225 West Wacker Dr #3000
Chicago, IL 60606

Ted R Frame Attorney
for Helm Concentrates etc
Frame & Matsumoto
P O Box 895
Coalinga, CA 93210

Andrew W. Vorzimer,
Raphael Cotkin and
Joan M Dolinsky Attorneys
for Helm Concentrates etc
Cotkin & Collins
201 N Figueroa St S-1100
Los Angeles, CA 90012

Dear Parties:

The Association, after carefully considering the parties' contentions, hereby reaffirms the appointment of John E. Peterson as the Arbitrator in the above captioned matter.

Additionally we received a telecopied letter dated February 18, 1993, from Attorney Vorzimer, advising that Respondents Helm Concentrates, Inc., Britz, Inc. and Helm Tomatoes, Inc. will file an action in Superior Court seeking a temporary restraining order against the American Arbitration Association in this proceeding.

We believe it is neither necessary nor proper to include the Association nor the Arbitration Panel as parties to any legal proceedings between the parties in connection with this arbitration. Section 47 of the Rules states that "Neither the AAA nor any Arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration."

Were the AAA to become involved in judicial proceedings between the parties, it would detract from its function as an impartial administrator. Thus, the AAA does not generally appear or participate in litigation relating to an arbitration. Therefore, the Association will not answer or appear at the Court Hearing.

The Association will, however, abide by any Order issued by the Court.

Very truly yours,

/s/ ROCCO M. SCANZA

Rocco M. Scanza
Regional Vice President
RMS/ves

JORY, PETERSON & SAGASER
555 West Shaw Avenue, Suite C-1
Post Office Box 5394
Fresno, California 93755
Telephone: (209) 225-6700

John E. Peterson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION
LOS ANGELES DIVISION

In the Matter of:

ALFA-LAVAL FOOD AND DAIRY CO., a division of ALFA-LAVAL, INC., and ALFA-LAVAL CREDIT AB,

Petitioners,

and

HELM CONCENTRATES, INC., BRITZ, INC., and HELM TOMATOES, INC.,

Respondents.

American Arbitration Association Case No. 72199 2101 90

FINAL AWARD OF ARBITRATOR

The following award is entered pursuant to the Opinion of Arbitrator made and submitted contemporaneously herewith:

1. Neither Helm Concentrates, Inc., Helm Tomatoes, Inc., nor Britz, Inc., shall have any recovery on their counterclaim as to either Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., or Alfa-Laval Credit AB.

2. Neither Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., nor Alfa-Laval Credit AB shall have any recovery as to Helm Tomatoes, Inc., on Petitioners' claim herein.

3. Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., shall recover nothing by reason of its claim on the Agreement for the Supply of Sterile Pouches.

4. Alfa-Laval Credit AB shall have an award entered in its favor against Helm Concentrates, Inc., on the Lease Agreement covering three StarAsept filling machines as follows:

a. For reimbursable services: $30,600

b. For equipment rent: $260,164

Subtotal: $290,764

5. Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., shall have an award in its favor against both Helm Concentrates, Inc., and Britz, Inc., on the Agreement for Sale of Equipment and Services and Britz, Inc.'s guarantee as follows:

a. Sale of equipment: ($154,716)

b. Reimbursable services: $451,377

Subtotal: $296,661

TOTAL DAMAGES AWARD: $587,425

6. Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., is awarded its attorneys' fees and costs of suit, as against Helm Concentrates, Inc., and Britz, Inc., to be made by supplemental award following receipt and analysis of supporting declaration(s) from attorneys for Alfa-Laval Food and Dairy Co.

DATED: March 31, 1993.

/s/ JOHN E. PETERSON
John E. Peterson, Arbitrator

RECEIVED
MAY 10 1993
AMERICAN ARBITRATION
ASSOCIATION
LOS ANGELES DIVISION OFFICE

JORY, PETERSON & SAGASER
555 West Shaw Avenue, Suite C-1
Post Office Box 5394
Fresno, California 93755

Telephone: (209) 225-6700

John E. Peterson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION

LOS ANGELES DIVISION

In the Matter of:

ALFA-LAVAL FOOD AND DAIRY CO., a division of ALFA-LAVAL, INC., and ALFA-LAVAL CREDIT AB,

Petitioners,

and

HELM CONCENTRATES, INC., BRITZ, INC., and HELM TOMATOES, INC.,

Respondents.

American Arbitration Association Case No. 72199 2101 90

SUPPLEMENTAL AWARD OF ATTORNEYS' FEES AND COSTS

Pursuant to paragraph 6 of the Final Award of Arbitrator signed on March 31, 1993, the Arbitrator has read and considered Petitioners' Application for Attorneys' Fees and Costs and the exhibits served and filed with it, together with Respondents' May 4, 1993 letter opposing the Application.

A. *Attorneys' Fees*

Section 7 of the Equipment Agreement signed by Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., Britz, Inc., and Helm Concentrates, Inc., reads in pertinent part "... the prevailing party in arbitration shall be entitled to reasonable attorneys' fees."

Under the authority of California Code of Civil Procedure Section 1033.5 and *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 275 Cal.Rptr. 646, the Arbitrator hereby exercises his discretion and awards attorneys' fees in favor of Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., and against Helm Concentrates, Inc., and Britz, Inc., in the amount of $1,412,953.75.

In connection with this award of attorneys' fees, the Arbitrator has reviewed the detailed explanation of the basis for Petitioners' application, Exhibit A. The Arbitrator is familiar with the hourly rates charged by attorneys in the San Joaquin Valley, and finds that although the rates charged by Petitioners' attorneys in this matter are in the high end of the range of prevailing market rates, they are nevertheless reasonable under the circumstances.

Respondents accurately note that Michael Dockterman, one of Petitioners' attorneys, although present during the hearings held in this arbitration, did not participate in argument or the presentation of evidence. However, Petitioners faced complex and technical claims in excess of $40 million. The Arbitrator infers that Mr. Dockterman's clients believed his presence at trial was necessary to their case, from the fact that Mr. Dockterman attended the

damages phase of the arbitration in the face of the Arbitrator's earlier indication that there would be no award of attorneys' fees to either side. Although not determinative, this belief is entitled to some weight. The Arbitrator finds that under all of the circumstances of this case, Mr. Dockterman's presence at the arbitration was reasonably necessary to the presentation of Petitioners' case.

B. *Costs*

Respondents object to the amount claimed for "consulting services" by Messrs. Hincz, Lechowich, Long and Lowen, and about "services rendered" by Coopers & Lybrand. In addition, Respondents complain about the lack of detail in the claim for travel expenses, and the lack of substantiation in the Veronica Foods/purchase of paste, among other things.

Although the declaration submitted by Mr. Dockterman in support of Petitioners' application for attorneys' fees is technically deficient (see California Code of Civil Procedure Section 2015.5) Respondents have waived any right they might have to object the technical deficiency by failing to raise it in their opposing letter of May 3, 1993. Accordingly, the Arbitrator will consider Mr. Dockterman's declaration as a properly verified memorandum of attorneys' fees and costs. Similarly, although Respondents have not provided their objections to the content of Petitioners' application in affidavit or declaration form, the Arbitrator will consider Respondents' May 3 letter as properly objecting to Petitioners' application, both as to attorneys' fees and as to costs. See *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624, 134 Cal.Rptr. 602, 606; and *Oak Grove School District v. City Title Insurance Co.* (1963) 217 Cal.App.2d 678, 698-699, 32 Cal.Rptr. 288, 299.

Under *Oak Grove* (217 Cal.App.2d at 698-699, 32 Cal.Rptr. at 299) if the items in the Petitioners' application

appear to be proper charges, the application is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred, and the burden of showing that an item was not properly chargeable or is unreasonable is on Respondents. However, where a claim is made for a disbursement which on its face does not appear to be proper or is for a disbursement the necessity for which is doubtful, and the item is properly challenged, the burden is on Petitioners to establish the necessity for the disbursement.

For ease of reference the Arbitrator has numbered the items on Exhibit B of Petitioners' application, 1 through 25, inclusive, on the first page, and 26 through 47, inclusive, on the second page. After consideration of items of costs allowable and not allowable under CCP Section 1033.5, and consistent with the Arbitrator's discretion under *Oak Grove, supra,* and *Bussey v. Affleck, supra,* the Arbitrator disallows items 2, 9, 11, 12, 18, 19, 20, and 30, because Petitioners have not carried their burden of proof as to these items. The Arbitrator awards costs in favor of Alfa-Laval, Inc., and against Respondents Helm Concentrates, Inc. and Britz, Inc., in the amount of $696,747.45.

The Arbitrator finds that the costs and disbursements set forth in Petitioners' application allowed by this award (1) are those ordinarily billed to the client; (2) are not included in the overhead component of counsel's hourly rate; and (3) were reasonably necessary for the adequate presentation of Petitioners' case. See *Bussey, supra,* 225 Cal.App.3d at 1166, 275 Cal.Rptr. at 648; and CCP Section 1033.5. The award of these costs and disbursements is set forth separate from the award of attorneys' fees only for ease of reference.

C. *Conclusion*

In making these determinations, the Arbitrator has considered a number of factors, including, but not limited to,

the nature of this arbitration, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, and the success of Petitioners in resisting Respondents' claims and recovering damages from Respondents. The total award of attorneys' fees and costs is $2,109,701.10.

DATED: May 6, 1993.

/s/ JOHN E. PETERSON

John E. Peterson, Arbitrator